

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 822

F. A. GILLESPIE, PLAINTIFF IN ERROR,

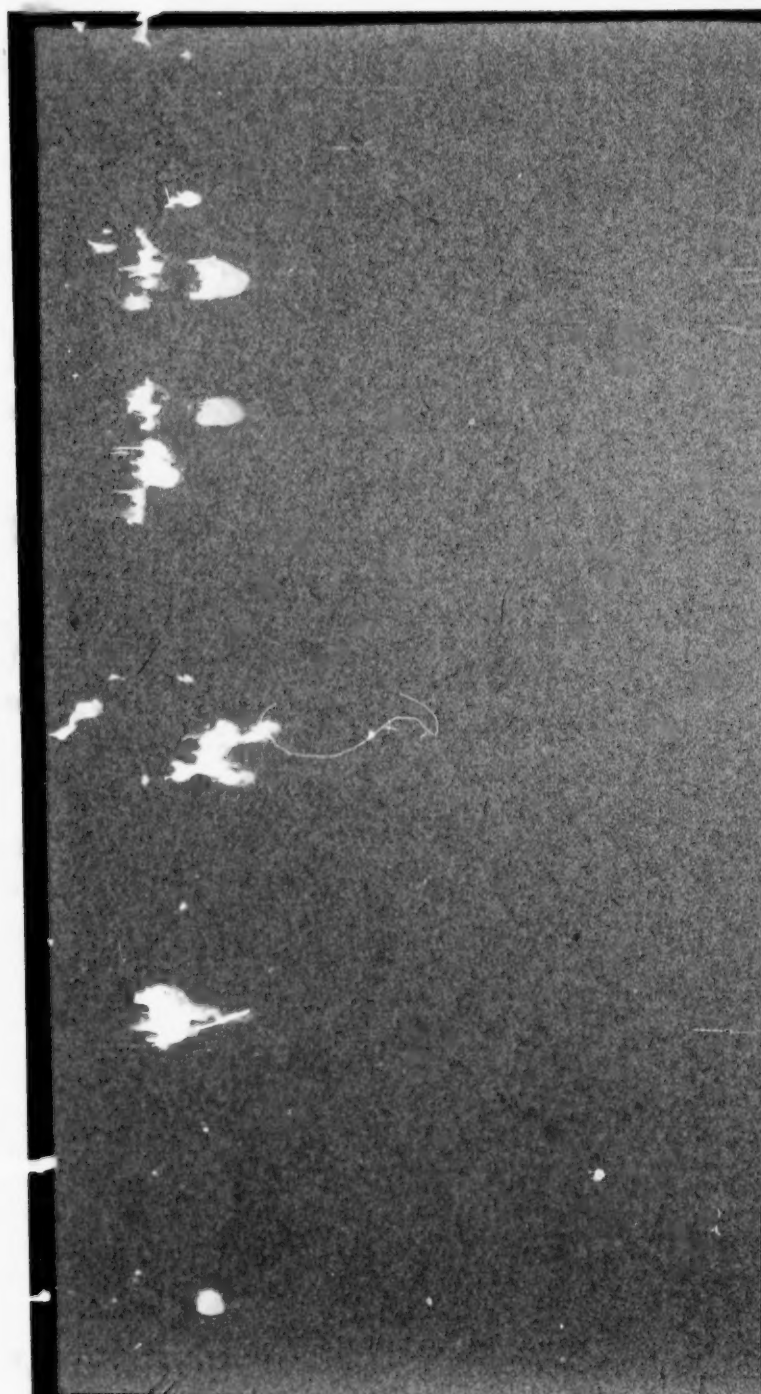
vs.

THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED MAY 14, 1921.

(23,269)



(28,269)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 912.

F. A. GILLESPIE, PLAINTIFF IN ERROR,

vs.

THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

INDEX.

	Original	Print.
Return to writ of error.....	a	1
Citation showing service.....	1	1
Petition for writ of error.....	2	2
Order allowing writ of error.....	2	2
Præcipe for transcript on writ of error.....	3	3
Service of same.....	3	3
Assignment of errors.....	4	4
Writ of error.....	10	9
Bond on writ of error.....	12	10
Certificate of lodgment.....	13	11
First page of transcript.....	14	12
Petition in error in supreme court.....	15	12
Transcript from State auditor, Oklahoma.....	17	14
Supplemental returns for year 1915.....	18	14
Supplemental returns for year 1916.....	34	21
Supplemental returns for year 1917.....	53	31
Supplemental returns for year 1918.....	73	42
Stipulation for consolidation and order thereon.....	93	53
Judgment of State auditor.....	95	55

	Original.	Print.
Written complaint of F. A. Gillespie.....	101	60
Order of auditor on written complaint.....	102	62
Stipulation and agreement of parties as to transcript....	103	62
Order of State auditor on stipulation.....	104	63
Certificate of State auditor to transcript.....	104	64
Demurrer of State of Oklahoma.....	105	64
Journal entry district court.....	107	66
Certificate of court clerk to transcript.....	108	67
Journal entry of submission.....	109	67
Journal entry of judgment.....	110	68
Opinion supreme court, Kane, J.....	111	69
Petition for rehearing.....	116	72
Journal entry of judgment.....	118	73
Opinion supreme court, Harrison, C. J.....	119	73
Clerk's certificate.....	122	75

Return to Writ.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, Oklahoma, this the 5th day of May, A. D. 1921.

[Seal of Supreme Court State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

Filed in Supreme Court of Oklahoma May 4, 1921. William M. Franklin, Clerk.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Oklahoma, Greeting:

You are hereby cited and admonished, to be and appear at and before the Supreme Court of the United States, at the City of Washington, District of Columbia, within Thirty (30) days from and after the date this citation bears date, pursuant to a Writ of Error filed in the Office of the Clerk of the Supreme Court of the State of Oklahoma, wherein F. A. Gillespie is the Plaintiff in Error, and you, The State of Oklahoma, are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Oklahoma, this the 4th day of May, A. D., 1921.

JNO. B. HARRISON,
*Chief Justice of the Supreme Court of
the State of Oklahoma.*

Attest:

[Seal of Supreme Court State of Oklahoma.]

WM. M. FRANKLIN,
*Clerk of the Supreme Court of
the State of Oklahoma,*

By REUEL HASKELL, JR.,
Dep.

I, S. P. Freeling, Attorney General of the State of Oklahoma, and C. W. King, Assistant Attorney General of said State, and Attorneys of Record for Defendant in Error in the above entitled case or cause, hereby acknowledge due service of the above Citation, and enter appearance in the Supreme Court of the United States.

S. P. FREELING,
Attorney General of Oklahoma;
 C. W. KING,
Assistant Attorney General of Oklahoma,
Attorneys for the said Defendant in Error.

2 Filed in Supreme Court of Oklahoma May 4, 1921. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Petition for Writ of Error.

Comes now F. A. Gillespie, the Defendant in Error in the above entitled cause, and, considering and feeling himself aggrieved by the final decision of the Supreme Court of the State of Oklahoma in rendering its final judgment or decree against him in said cause, and files herewith his Assignment of Errors, hereby referring thereto, and making the same a part hereof, the same as if fully set forth and copied herein, and prays that a writ of error from the said decision and judgment or decree to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

JAMES P. GILMORE,
Attorney for F. A. Gillespie.

STATE OF OKLAHOMA, ss.:

Supreme Court.

Let the Writ of Error issue upon the execution of a bond by the said F. A. Gillespie, Defendant in Error, to The State of Oklahoma, Plaintiff in Error, in the sum of One Thousand Dollars, such bond, when approved to act as a supersedeas.

JNO. B. HARRISON,
Chief Justice of Supreme Court of Oklahoma.

Attest:

[Seal of Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court Okla.,
 By REUEL HASKELL, JR., *Dep.*

3 Filed in Supreme Court of Oklahoma Apr. 30, 1921. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Præcipe for Transcript on Writ of Error.

To the Honorable William M. Franklin,
Clerk of the Supreme Court of Oklahoma:

Please prepare transcript of the entire record in the above entitled cause, omitting nothing therein, for use on Writ of Error, for and in behalf of the above named Defendant in Error, for the purpose of taking the above entitled cause to the Supreme Court of the United States for review by that Court.

Dated April 29th 1921.

JAMES P. GILMORE,
Attorney for Defendant in Error.

Received a true and correct copy of the above and foregoing Præcipe, and due service thereof is hereby acknowledged, this the 30th day of April A. D. 1921, and, inasmuch as transcript of the entire record is called for, the above named Defendant in Error waives any and all time for the suggestion of additional portions to be incorporated in said record, and consents that the same may be transmitted to the Supreme Court of the United States at any time the same may be ready therefor.

S. P. FREELING,
Attorney General;
C. W. KING,
Assistant Attorney General,
For the Plaintiff in Error.

4 Filed in Supreme Court of Oklahoma May 4, 1921. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Assignment of Errors.

Comes now F. A. Gillespie, the Defendant in Error, in the above entitled cause, and having been the Defendant in the District Court of Oklahoma County, Oklahoma, and being the Plaintiff in Error in said Cause in the Supreme Court of the United States, and files herewith his Petition for a Writ of Error, in connection with this Assignment of Errors, and says, avers, and shows that there are errors in the Record and Proceedings in and of said cause, and there are manifest errors in the actions, doings, rulings, judgments and decrees of the Supreme Court of the State of Oklahoma, and for the purpose of having the same reviewed in and by the Supreme Court of the United States, hereby makes and files the following Assignment of Errors, on which he will rely upon his prosecution of a Writ of Error in the above entitled suit or cause, to-wit:

1. The Supreme Court of Oklahoma erred in holding and deciding that the Act of the Legislature of the State of Oklahoma, approved March 17th, 1915, being House Bill No. 599, Chapter 164, which appears at and on pages 232 to 237, inclusive, of the Session Laws of Oklahoma, 1915, and said Act, as amended by the Act of the Legislature of the State of Oklahoma, approved March 2nd, 1917, being House Bill No. 350, which appears at and on pages 227, inclusive, of the Session Laws of Oklahoma, 1917, applied to, and as to, his oil or gas, or his oil and gas mining leases, or oil and gas mining property, located on or produced from the restricted lands of Indians, or on the lands of Indians being restricted, in the County of Creek, and State of Oklahoma, formerly a part of the Creek Nation, and the Reservation for the Creek Tribe or Nation of Indians, and in the County of Osage, State of Oklahoma, formerly the Osage Reservation, and produced by and from said Indian lands covered by said leases, and his income derived from and produced thereby and therefrom, as set forth in and by the record in and of said cause, as described by his Supplemental Returns to the Auditor of the State of Oklahoma, in said cause in said Supreme Court of Oklahoma, are valid, and valid as so applied, and the validity of said Act, and of said Act as so amended, and of each and both of them, and of each and every part thereof, was drawn in ques-

5

tion and denied by this Plaintiff in Error, as applied to him, and his said property and leases, and his income therefrom, and from each and all of them, and was drawn in question and denied by him on the ground of their being repugnant to, and in contravention and violation of the Constitution of the United States, and the Laws and Treaties of the United States, made in pursuance thereof, and more particularly in that said Act, and said Act as so amended, and as so applied to him, and his said property, leases and income, are and were so repugnant to, and in contravention and violation of said Constitution of the United States, and the Laws and Treaties of the United States, made in pursuance thereof, upon the following grounds, and for the following reasons, to-wit:

First. That said Act, and said Act so amended, are repugnant to, and in contravention and violation of, Section One, of the Fourteenth Amendment to the Constitution of the United States.

Second. That said Act, and said Act so amended, are repugnant to, and in contravention and violation of Section Eight (8) of Article One (1), of the Constitution of the United States.

Third. That said Act, and said Act so amended, are an unauthorized interference with the right of Congress to regulate commerce with the Indians Tribes or Nation hereinbefore mentioned.

Fourth. That said Act, and said Act as so amended, lay an unlawful burden upon an agency of the Government of the United States.

Fifth. That said Act, and said Act as so amended, abridge the immunities of this Plaintiff in Error upon his property used in the exercise of a Federal Agency.

Sixth. That the tax imposed by said Act, and said Act as so amended, upon said income derived from said leases is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon said Congress by the Constitution of the United States.

Seventh. That the taxes, imposed by said Act, and said Act so amended, are and were taxes upon an agency of the Government of the United States.

Eighth. That the taxes imposed by said Act, and said Act so amended, are and were taxes upon a privilege or occupation of, and exacted from, an instrumentality of the United States.

6 Ninth. That the taxes imposed by said Act, and said Act so amended, are and were taxes upon a license or franchise granted by the United States, and exercised by this Plaintiff in Error under and by virtue of the Constitution, Laws and Treaties of the United States.

Tenth. That the taxes imposed by said Act, and said Act as so amended, are and were taxes upon an agent of the Government of the United States, and his occupation as such.

Eleventh. That the taxes imposed by said Act, and said Act as so amended, are and were taxes upon income from property, when the property itself is exempt from taxation by the State of Oklahoma, by reason of the Constitution, Laws and Treaties of the United States.

Twelfth. That the taxes imposed by said Act, and said Act as so amended, are and were taxes, substantially and in effect, upon the leases, and property from which said income is and was derived, and, said leases and property being exempt from taxation by the State of Oklahoma, cannot, therefore, be thus imposed.

Thirteenth. That the taxes imposed by said Act, and said Act as so amended, are and were taxes indirectly imposed by the State of Oklahoma, when said State cannot directly impose such taxes.

Fourteenth. That said tax imposed by said Act, and said Act so amended, are and were taxes upon the powers and operations of the Government of the United States.

Fifteenth. That the taxes imposed by said Act, and said Act so amended, are and were taxes upon the property of the United States, or property held in trust by it, and for its Indian wards.

That each and all of said contentions were denied by the said Supreme Court of Oklahoma, and the validity of said legislative Acts, and each and both of them, as well as the right of the Auditor of the State of Oklahoma to enforce the provisions thereof against this Plaintiff in Error, and against his said property and leases, and to levy, assess and collect said taxes against and on said income derived from said leases on said restricted Indian lands, and derived from said restricted leases, was upheld by the said Supreme Court of Oklahoma, and, the decision of said Court is and was in favor of their validity and against their invalidity, all repugnant to, and in contravention and violation of, the Constitution, Laws and Treaties of the United States, as aforesaid.

7 2. The Supreme Court of Oklahoma, furthermore, erred in holding the acts of the State Auditor of the State of Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by said Act, and said Act so amended, as aforesaid, as applied to and exercised against this Plaintiff in Error, and his income above described, and his property and leases above described, were lawful and valid, and the validity of said acts, and of said authority, is and was drawn in question and denied by this Defendant in Error on the ground of their being repugnant to, and in contravention and violation of, the Constitution of the United States, and the laws and treaties made in pursuance thereof, and more particularly, in that said acts, and the authority so exercised by said Auditor of the State of Oklahoma, are repugnant to, and in contravention and violation of, said Constitution, Laws and Treaties of the United States, upon the following grounds, and for the following reasons, to-wit:

First. Said acts and authority so exercised by said Auditor are repugnant to, and in contravention and violation of, Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

Second. Said acts, and the authority so exercised by said Auditor are repugnant to, and in contravention and violation of, Section Eight of Article One (1) of the Constitution of the United States.

Third. Said acts, and the authority so exercised by said Auditor, are an unauthorized interference with the right of Congress to regulate commerce with the Indian Tribes or Nations hereinbefore mentioned.

Fourth. Said acts, and the authority so exercised by said Auditor, lay an unlawful burden upon an agency of the Government of the United States.

Fifth. That said acts, and the authority so exercised by said Auditor, abridge the immunities of this Defendant in Error upon his property used in the exercise of a Federal Agency.

Sixth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, upon said income derived from said leases, are and were taxes upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon said Congress by the Constitution of the United States.

Seventh. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon an agency of the Government of the United States.

8 Eighth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon a privilege or occupation of, and exacted from, an instrumentality of the United States.

Ninth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon a license or franchise granted by the United States, and exercised by this Plaintiff in Error under and by virtue of the Constitution, Laws and Treaties of the United States.

Tenth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon an agent of the Government of the United States, and his occupation as such.

Eleventh. That taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon income derived from property, when the property itself is exempt from taxation by the State of Oklahoma, by reason of the Constitution, Laws and Treaties of the United States.

Twelfth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes, substantially and in effect, upon the leases and property from which said income is de-

rived, and said leases and property being exempt from taxation by the State of Oklahoma, cannot, therefore, be thus taxed.

Thirteenth. That the taxes, imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes indirectly imposed by the State of Oklahoma, when said State cannot directly impose such a tax.

Fourteenth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon the powers and operations of the Government of the United States.

Fifteenth. That the taxes imposed by said Acts, and the authority so exercised by said Auditor, are and were taxes upon the property of the United States, or property held in trust by it, and for its Indian wards.

That each and all of said contentions were denied by the said Supreme Court of the State of Oklahoma, and the validity of said Acts, and the authority so exercised by said Auditor, was upheld by said Court, and the decision of said Court is and was in favor of the validity of said Acts, and the validity of said authority so exercised, and against their invalidity, all repugnant to, and in contravention and violation of the Constitution, Laws and Treaties of the United States, as aforesaid.

9 3. Because said Supreme Court of the State of Oklahoma erred in refusing to affirm the judgment or decree of said District Court of Oklahoma County, Oklahoma, which was in favor of this Plaintiff in Error, and against said State of Oklahoma.

4. Because said Supreme Court of the State of Oklahoma erred in reversing said judgment or decree of said District Court of Oklahoma County, Oklahoma, which said judgment was in favor of this Plaintiff in Error, and against said State of Oklahoma.

5. Because said Supreme Court of the State of Oklahoma erred in not adhering to its first decision and opinion, and its first judgment or decree, dated the 14th day of December, A. D., 1920, and erred in thereafter reversing the same, and rendering its present decision and opinion, and making and entering its judgment or decree, now complained of by this Plaintiff in Error.

6. Because said Supreme Court of the State of Oklahoma erred in entertaining and sustaining the Petition for Rehearing filed by said State of Oklahoma, Plaintiff in Error, in said Supreme Court of the State of Oklahoma, in this cause, and in its decision and opinion, and judgment or decree, reversing the judgment or decree of said District Court of Oklahoma County, Oklahoma, and in reversing and remanding said cause to said District Court of the State of Oklahoma, with directions to enter judgment for said State of Oklahoma.

7. Because the Supreme Court of the State of Oklahoma erred in reversing the judgment or decree of said District Court of Oklahoma

County, Oklahoma, and in affirming the action, rulings, judgments or decrees of said Auditor of the State of Oklahoma.

Wherefore, for these, and other manifest errors appearing in the Record, the said F. A. Gillespie, as Plaintiff in Error, prays that the said judgment or Decree of the Supreme Court of the State of Oklahoma be reversed, set aside, and for naught held, and that judgment be rendered for this Plaintiff in Error, granting and rendering to him his rights under the Constitution, Laws and Treaties of the United States, and said Plaintiff in Error also prays judgment for his costs.

JAMES P. GILMORE,
Attorney for Plaintiff in Error.

10 Filed in Supreme Court of Oklahoma May 4, 1921. William
M. Franklin, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable
Judges of the Supreme Court of the State of Oklahoma, Greeting:

Whereas, and because, in the Records and Proceedings, and also the rendition of the Judgment and Decree, and on the record, which are in the said Supreme Court of the State of Oklahoma, before you, or some of you, and rendered, made and entered on the 5th day of April, A. D., 1921, by said Court, said Supreme Court of the State of Oklahoma being the highest Court of Law or Equity of the said State of Oklahoma, in which a decision could be had, in the said suit between The State of Oklahoma and F. A. Gillespie, being styled and entitled, in the Supreme Court of the State of Oklahoma, "The State of Oklahoma, Plaintiff in Error, vs. F. A. Gillespie, Defendant in Error, and numbered 11356 on the Docket thereof, wherein was drawn in question the validity of a Statute of, or an authority exercised under the said State of Oklahoma, and the validity of Statutes of, and authorities exercised under, the said State of Oklahoma, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States, and on the ground of their being repugnant to the Constitution, Treaties and Laws of the United States, and the decision was in favor of such, their validity, a manifest error hath happened to the great damage of said F. A. Gillespie, as by his complaint, and said Records and Proceedings appear; and,

Whereas, we are, and being willing, that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the Record and Proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together

with this Writ, so that you have the said Record and Proceedings aforesaid in the said Supreme Court at Washington, within Thirty Days from the date hereof, to the end that the Record and Proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this the 4th day of May, in the year of our
11 Lord, One Thousand, Nine Hundred and Twenty-One.

ARNOLD C. DOLDE,
Clerk of the District Court of the United States, Western District of Oklahoma, Being the District within Which the Capital of Oklahoma, at Which the Supreme Court of said State Sits, is Located.

Allowed:

JNO. B. HARRISON,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court, Okla.,
By REUEL HASKELL, JR.,
Dep.

12 Filed in Supreme Court of Oklahoma May 4, 1921. William M. Franklin, Clerk.

Copy.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Know all men by these presents: That we, F. A. Gillespie, as principal, and L. A. Gillespie and R. E. Downing, as sureties, are held and firmly bound unto The State of Oklahoma, in the full sum of One Thousand Dollars (\$1,000.00), its successors and assigns, to which payment well and truly to be made, we find ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this the 3rd day of May, in the year of our Lord, One Thousand, Nine Hundred and Twenty-One.

Whereas, the above named, Defendant in Error, (Plaintiff in Error in the said cause or suit to be taken to the Supreme Court of the United States on Writ of Error), seeks to prosecute a Writ of Error to the Supreme Court of the United States to reverse the judgment and decree tendered in the above entitled action or cause by the Supreme Court of the State of Oklahoma.

Now, the condition of the above obligation is such, that if the said F. A. Gillespie shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and effect.

F. A. GILLESPIE,
Principal,

By JAMES P. GILMORE,
His Attorney.

L. A. GILLESPIE,
R. E. DOWNING,
Sureties.

Bond approved, and to operate as supersedeas. Dated May 4th 1921.

JNO. B. HARRISON,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Okla.,

By REUEL HASKELL, JR.,
Dep.

13 STATE OF OKLAHOMA, ss:

Supreme Court.

I, William M. Franklin, Clerk of said Court, do hereby certify that there were lodged with me, as such Clerk, on the 4th day of May, 1921, in the cause or matter of The State of Oklahoma, Plaintiff in Error, versus F. A. Gillespie, Defendant in Error:

1. The original bond, of which a copy is herein set forth, dated May —, 1921.

2. Two copies of Writ of Error, as herein set forth, one for the Defendant in Error, and one to file in my office, filed, this 4th day of May, 1921.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Oklahoma City, this 4th day of May, 1921.

[Seal of the Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By REUEL HASKELL, JR.,
Assistant.

14 In the Supreme Court of the United States.

No. 11356.

F. A. GILLESPIE, Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, Defendant in Error.

In Error to the Supreme Court of the State of Oklahoma.

TRANSCRIPT OF RECORD.

15 Be it remembered, that, on the 24th day of April, 1920,
The State of Oklahoma filed in the Supreme Court of the
State of Oklahoma its Petition in Error, with the Transcript attached,
against F. A. Gillespie, which said Petition in Error, with said
Transcript attached, is in words and figures as follows, to-wit:

Filed in the Supreme Court of Oklahoma April 24, 1920. William
M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

at the Matter of Income Tax Returns and Assessments of F. A.
Gillespie for the Years 1915, 1916, 1917, and 1918.

Petition in Error.

Comes now the plaintiff in error, and complaining of the defend-
t in error, states:

That heretofore, to-wit: on the 16th day of April, 1920, in the
District Court of Oklahoma County, State of Oklahoma, the defend-

ant in error recovered a judgment against the plaintiff in error, the State of Oklahoma, holding and decreeing the action of the State Auditor of the State of Oklahoma, in assessing, levying and enforcing payment of income taxes from the said defendant in error, F. A. Gillespie, for the years 1915, 1916, 1917 and 1918, in the aggregate sum of \$35,778.41, to be illegal, and that said alleged taxes and the assessment thereof were illegal, in that said income alleged to be subject to the said taxes is by virtue of the Acts of Congress and the Constitution of the United States, and the laws and Constitution of the State of Oklahoma exempt from taxation, and not subject to the income tax laws of the State of Oklahoma.

That said judgment and decree of said court also ordered and directed the State Auditor to rebate and refund to the said defendant in error, F. A. Gillespie, the said sum of \$35,778.41, heretofore
16 paid to the said State of Oklahoma and its Auditor, F. C. Carter, as more fully shown in the transcript hereto attached and made a part hereof; and the said State of Oklahoma avers that there is error in said record and proceeding, in this, to-wit:

I.

That said Court erred in not rendering judgment in favor of the plaintiff in error, The State of Oklahoma, on the pleadings, stipulations, returns and supplemental returns filed in the said cause, and constituting the record thereof.

II.

Said court erred in holding as a matter of law that the income upon which the tax was sought to be assessed and collected was exempt from such taxation under the Acts of Congress and the Constitution of the United States, and was not subject to the Constitution and laws of the State of Oklahoma.

III.

Said Court erred in overruling the demurrer filed by the plaintiff in error to the returns, reports and supplemental returns filed in said cause by the defendant in error.

Wherefore, plaintiff in error prays that said judgment so rendered may be reversed, set aside and held for naught, and that judgment may be rendered in favor of the plaintiff in error and against the defendant in error, upon the pleadings, record, returns, reports and supplemental returns as set forth in the transcript thereof hereto attached and made a part hereof, and for such other and further relief as to the Court may seem just.

THE STATE OF OKLAHOMA,

Plaintiff in Error.

S. P. FREELING, *Attorney General.*

C. W. KING,

Assistant Attorney General.

Filed in the Supreme Court of Oklahoma Apr. 24, 1920. William
M. Franklin, Clerk.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

In the District Court within and for Said County and State.

No. 27439.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments — F. A. Gillespie,
for the Years 1915, 1916, 1917, and 1918.

Transcript on Appeal from the Auditor of the State of Oklahoma.

Filed in the District Court, Oklahoma County, Oklahoma, April
24, 1920.

CLIFF MYERS,

Court Clerk,

By DAN SMITH,

Deputy.

18 STATE OF OKLAHOMA,
County of Oklahoma, ss:

In the District Court within and for Said County and State.

No. 27439.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments of F. A. Gillespie
for the Years 1915, 1916, 1917, and 1918.

Transcript of Appeal from the Auditor of the State of Oklahoma.

x-----x
 : To be filled in by State Auditor. :
 : :
 : Assessment List No..... :
 : Page.....Line..... :
 : File No..... :
 : Audited by..... :
 x-----x

Above space is to be Auditor
 showing date received.

SUPPLEMENTAL RETURN OF NET ANNUAL INCOME BY F. A. GILLESPIE
IN CONNECTION WITH RETURN HERETOFORE MADE BY HIM FOR
THE YEAR 1915, CLAIMING NET INCOME SHOWN BY THIS
SUPPLEMENTAL RETURN EXCEPT FROM TAXATION BY
STATE OF OKLAHOMA.

F. A. GILLESPIE, (hereinafter for convenience referred to as the Taxpayer,) having heretofore regularly made return of his annual net income to the Auditor of the State of Oklahoma, (hereinafter for convenience referred to as the Auditor), for the year 1915, which was duly assessed, and the tax thereon computed, by said Auditor, and paid by said Taxpayer, within the time required by law, but said Auditor now believing and claiming that said Taxpayer did not return and pay upon as much net income as he should have returned and paid upon, and said Taxpayer claiming and alleging that he returned and paid upon all the net income, which the State of Oklahoma was and is entitled to impose, assess and collect an income tax upon, and claiming and alleging that the income which he has heretofore not returned for taxation is exempt from taxation by the State of Oklahoma, and that the Statutes of the State of Oklahoma imposing, purporting or attempting to impose, a tax upon such income, are void, null and of no force and effect, and in violation and contravention of the Constitution, Laws, Treaties and Agreements of the United States of America, and of the Constitution of said State of Oklahoma, yet, nevertheless, that said Auditor may have the full facts with reference thereto, and may have before him the income of said Taxpayer in its entirety, said Taxpayer hereby makes this Supplemental Return, in connection with his said return for the year 1915, heretofore made, at all times protesting, claiming and alleging, and willing to show, and in no wise waiving, that said income, for which no return has heretofore been made, and no income tax paid thereon, is exempt from taxation by said State of Oklahoma, and that the Statutes of Oklahoma imposing, or purporting, pretending or attempting to impose, any income tax or penalties, or both, upon the income herein and hereby disclosed and set forth in this Supplemental Return as so exempt, or any income or penalties, or both, in addition to the taxes already imposed, assessed, levied and collected upon the income set forth and disclosed in his said Original Return for said year 1915, are null, void and of no force and effect, and are in violation and contravention of said Constitution Laws, Treaties and Agreements of said United States, and of said Constitution of the State of Oklahoma, and that said State of Oklahoma, and its said Auditor, Officers, Representatives and Agents, are without right, power or authority to impose, assess, levy and collect such additional taxes or penalties, or both, upon such income of said Taxpayer, so claimed to be exempt, that part of this Supplemental Return, together with the supplemental sheets added thereto, disclosing, stating and setting forth said income, being on the Regular Printed Form, prescribed and promulgated by said Auditor, modified as necessary, and with the consent of said Auditor, and to be a part hereof, and of the allegations, statements and averments following, all being and constituting said Taxpayer's Supplemental Return.

THIS IS A STATE REPORT.

RETURN TO STATE AUDITOR, Oklahoma City, Oklahoma.

To Be Filled In By State Auditor
 Assessment List No. _____
 Page _____ Line _____
 File No. _____
 Audited by _____

S. E. & L., Form 1247
 PERSONAL CHECKS
 will NOT be
 Accepted in payment of
 income tax

IMPORTANT
 Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

THE PENALTY

For failure to have, this return in the hands of the State Auditor on or before March 1st, 1916 ~~the return~~
~~each day delinquent~~ in addition to the tax. (See Instructions on page 4.)

INCOME TAX

DEPARTMENT OF STATE AUDITOR

State of Oklahoma

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS—(as provided by Chap. 164
 Income received during the Year ended December 31st, 1915 ~~has been~~ ^{has been} ~~received~~ ^{received} ~~by~~ ^{by} ~~the~~ ^{the} ~~State~~ ^{State} ~~of~~ ^{of} ~~Oklahoma~~ ^{Oklahoma} ~~for~~ ^{for} ~~the~~ ^{the} ~~year~~ ^{year} ~~ended~~ ^{ended} ~~December~~ ^{December ~~31st~~ ^{31st} ~~1915~~ ¹⁹¹⁵)}

(NOTICE—Write Name and Address With Typewriter If Possible; If Not, Print It)

Filed by (or for) F. A. GILLESPIE, of 420 Kennedy Building
 (Street and Number)

Tulsa, Oklahoma,
 (Post Office Address) (State)

Give name of county in which principal income producing property is located County.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income to State of Oklahoma for the preceding year? _____
 If so, give your residence _____ Are you single or married? Married _____
 Was wife or husband living with you on Dec. 31, of the year for which this return is rendered? Yes _____
 If married, give full name of wife or husband Maud Gillespie
 Has your wife, or husband, income from sources independent of your own? _____
 Have you included your wife's or husband's income in this return? Yes

1. Gross income (brought from line 20) For Auditor—See Supplemental
2. General deductions (brought from line 28) _____
3. Net income _____

SPECIFIC REDUCTION

	Amount
4. Specific exemption of \$3,000 to an individual _____	3,000 00
5. Specific exemption of \$1,000 if living with spouse _____	1,000 00
6. Specific exemption of \$300 for each child under the age of 18 years _____	300 00
7. Specific exemption claimed for dependents, permanently domiciled with taxpayer _____	
8. Total deduction and exemptions (lines 4-5-6-7) _____	4,300 00
9. Taxable income _____	
NOTE:—If separate return is made by husband or wife _____	
and exemption is prorated, state amount claimed by: Husband \$ _____	
Wife - \$ _____	

COMPUTATION OF TAX ON NET INCOME

	Income	Tax
(a) On the first \$10,000 $\frac{3}{4}$ of 1 per cent (7½ mills) _____		
(b) On the next \$15,000 $1\frac{1}{2}$ per cent (15 mills) _____		
(c) On all amounts in addition to the foregoing <u>2 per cent (20 mills)</u> _____		
Total tax to be paid <u>Left to be filled in by Auditor—See Supplemental sheet following.</u>		

State on separate sheet (a) the number of such dependents; (b) the age of each; (c) the number engaged solely in acquiring an education, and (d) the legal liability of taxpayers to support each of such dependents.

21 on the net 25,000 3 percent,
25,000 4 percent,
 (on all amounts in addition to the foregoing, 5 percent.

GROSS INCOME

This statement must show in the proper space the ENTIRE AMOUNT of gains, profits and income received by the individual arising or accruing from all sources during the preceding calendar year and the income from property owned, and in every business, trade or profession carried on in this State by persons residing elsewhere. EXCEPT such income as is exempt from taxation hereunder by some law of the United States or this State, and the compensation of public officers for public service in such cases where the action thereof would be repugnant to the constitution.

In computing the income and deductions, the income of the wife shall be added to the income of her husband, and the income of each child under eighteen years of age to that of its parent, or parents when the wife is not living separately from the husband and the child separately from the parent or parents.

DESCRIPTION OF INCOME		Gross Income
10. Salaries and wages		
Wife's income		
Children's income		
11. Profession and vocations		
Wife's income		
Children's income		
12. Business, trade, commerce or sales or dealings in property, whether real or personal, give kind of business engaged in. Supplemental Sheet claimed as exempt.		
Wife's income See Supplemental Sheet following.		131,866.97
Children's income		
13. Rents Returned in original Return and tax paid thereon. See		
Wife's income Supplemental Sheet following.		400.00
Children's income		
14. Interest on notes, mortgages, bonds, bank deposits or evidence of debt of any kind whatsoever. Returned in Original Return and tax paid thereon. See		
Wife's income Supplemental Sheet following.		3,169.47
Children's income		
15. Dividends on stock of corporations, joint stock companies and associations		
Wife's income		
Children's income		
16. Fiduciaries (income received from guardians, trustees, executors, administrators, agents, receivers, conservators or other persons acting in a fiduciary capacity)		
Wife's income		
Children's income		
17. Partnership gains and profits whether distributed or not Returned in Original		
Wife's income Return and tax paid thereon. See Supplemental		40,248.75
Children's income See Supplemental		
18. Royalties from mines, oil wells, patents, franchises or other legalized privileges		
Wife's income		
Children's income		
19. All other sources not enumerated		
Wife's income		
Children's income		
Note—State here sources from which income entered on line 19 is received and amount received from each		
20. Total (enter total of column on line 1) left to be filled in by Auditor.		
See Supplemental Sheet following.		

SUPPLEMENTAL SHEETS. EXPLANATORY OF ITEMS GIVEN ON PRINTED FORM
CONNECTING SUPPLEMENTAL WITH ORIGINAL RETURN.
SPACE BEING INSUFFICIENT IN PRINTED FORM.

NOTE: (Items on these Supplemental Sheets are given under and with Numbers given on Printed Form, with the understanding words with such Numbers on such Form are made a part of each Item as if written herein, and Items belong to class therein described, and the words herein used are in addition to those used on Printed Form.)

GROSS INCOME.

- | | |
|---|--------------|
| 12. Supplementary and Departmental income from Departmental lease on restricted Indian lands, not heretofore returned for taxation, claimed to be exempt from taxation, See supplemental sheets following,----- | \$131,866.97 |
| 13. Returned in original return, and taxes paid thereon,----- | 400.00 |
| 14. Return ^d in original return, and taxes paid thereon,----- | 3,183.47 |
| 17. Returned in original return, and taxes paid thereon,----- | 40,248.75 |
| 20. (a) <u>TOTAL</u> , being Item 12, Departmental Income, exempt from taxation, and should not be included by Auditor in ascertaining total in Item 20, or on line 20, to be entered in Item 1, or line 1, as shown by Supplemental Sheets following,----- | 131,866.97 |
| (b) <u>TOTAL</u> , Items 13, 14 and 17 and should be entered by Auditor in Item 20, or on line 20,----- | 43,838.22 |
| (c) <u>TOTAL</u> , Items 12, 13, 14 and 17, thus including Departmental income, which Taxpayer claims is exempt, together with income already taxed, which should not be entered by Auditor or on line 20,----- | 175,705.19 |

GENERAL DEDUCTIONS.

- | | |
|--|-----------|
| 21. Supplementary, but allowable if tax be rightfully imposed on Item 12, and allowed by Auditor's Examiner, when considering Original Return and Taxpayer's books,----- | 52,536.48 |
| 23. Returned in original return as \$11,575.07, but allowed by Auditor's Examiner, when considering original return and taxpayer's books, and to be allowed in any event,----- | 10,067.35 |
| 24. Supplementary, omitted in original return by oversight, but allowed by Auditor's Examiner, when considering original return and taxpayer's books, and allowable in any event,----- | 907.00 |
| 26. Not returned in Original return, but allowed by Auditor's Examiner, when considering original return and taxpayer's books, and allowable if Item 12 should be taxed,----- | 6,599.01 |

27. Not returned in original return, but allowed by Auditor's examiner when considering original return and taxpayer's books, and allowable if Item 12 should be taxed, -----\$ 6,593.35

28. Total general deductions, Items 23 and 24, which should be entered by Auditor in Item 2, or on line 2, ----- 10,974.35

A. Item 20 (b), less Item 28 (showing no additional income to that shown by original return for 1915), unless Item 12, (Departmental Income), be included, which Taxpayer claims is exempt, and should be eliminated, and which should be entered by Auditor on line 1, Printed Form, showing actual net income, ----- 32,863.87

B. Item A, less Item 9, on line 9 of Printed Form, exemptions allowable, showing actual taxable income, and which should be entered by Auditor on line 8 of Printed Form, ----- 28,563.97

C. Computation of Tax on net Income (Item B) which should be entered by Auditor under that Head, on page 1 of Printed Form as follows:

	INCOME.	TAX.
(a) On first \$10,000.00	1 per centum, ----- \$10,000.00	----- \$100.00
(b) On next \$15,000.00	2 per centum, ----- 15,000.00	----- 300.00
(c) On Next \$25,000.00	3 per centum, ----- 3,563.97	----- 96.72
Total tax to be paid,	-----	----- \$496.72

GENERAL DEDUCTIONS

NOTE:—Claims for deductions cannot be allowed unless the information required below is clearly set out.

21. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any individual business. (There must not be included under this head personal, living or family expenses, business expenses of partnership or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions. Donations not a proper deduction) Supplemental See Itemize expense in full Supplemental Sheet preceding and following	52,536 48
22. All interest paid within the year on personal indebtedness of taxpayer Wife's deduction Children's deduction	
23. All State, county, school and municipal taxes paid within the year (not including those assessed against local benefits not Federal income tax) See in original Supplemental See Supplemental Sheet preceding and following	10,067 35
24. Losses actually sustained during the year incurred in trade, or arising from fires or storms and not compensated by insurance or otherwise. Oil and mining losses are termed investments and not proper deductions if you still hold lease. Wife's deduction See Supplemental Sheet preceding and following Children's deduction See	907 00
25. Debts due to the taxpayer actually ascertained to be worthless and charged off at the end of the year Wife's deduction Children's deduction NOTE:—State (a) of what the debt consisted; (b) when they were created; (c) when they became due, and (d) how they were actually determined to be worthless. (Give information on separate sheet.)	
26. Amount representing a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in business. No deduction shall be made for any amount of expenses of restoring property, or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return. Wear and tear, nor gasoline, nor upkeep on pleasure car not proper deduction Supplemental . See Supplemental Sheet preceding and following Wife's deduction Children's deduction NOTE:—State (a) what the property was on which depreciation was taken, (if buildings, state when erected, of what material constructed, and value of same as of January 1st of the calendar year for which this return is rendered); (b) what per cent of depreciation is claimed.	6,599 01
27. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of individual's interest in the output for the calendar year for which this return is rendered Supplemental Wife's deduction See Supplemental Sheet preceding and following Children's deduction NOTE:—State (a) gross value at the mines or wells, of the output for the calendar year for which this return is rendered; (b) your interest in the output; and (c) what per cent depletion is claimed.	6,593 35
28. Total general deduction (to be entered on line 2) NOTE:—If space is insufficient for answering any question attach a supplemental sheet to this return.	Let to be filled in by Auditor. See Supplemental Sheet preceding and following

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING THIS RETURN

State of ----- County of -----, ss.

----- being first duly sworn according to law, deposes and says.

That the foregoing return contains a full, true, correct and complete statement of all gains, profits and income received by ----- during the year for which the said return is made; that the said ----- is entitled to all the deductions and exemptions entered or claimed therein under the provisions of the income tax law. Further, affiant sayeth not.

Subscribed and sworn to before me this ----- day of -----, 19-----

(Seal)

Official Capacity.

INSTRUCTIONS

1. This return shall be made by each and every person in the State having a net income of \$3,000 or over, for the taxable year.
2. This return shall be made by each and every person residing outside of State deriving a net income from property owned and business, trade or profession carried on in this State, of \$3,000 or over, for the taxable year.
3. This return shall be filed with the State Auditor on or before the first day of March of each year.
4. This return shall show the net income of the taxpayer for the calendar year ending December 31st, last preceding; and shall be sworn to by taxpayer. Affidavit may be made before any officer authorized by law to administer oaths.
5. An unmarried individual or married individual not living with husband or wife, shall be allowed an exemption of \$3,000. Where husband and wife live together they shall be allowed jointly a total exemption of only \$4,000. In addition to the foregoing, an exemption of \$500 shall be allowed at line 6 for each child under the age of eighteen, and if such child is engaged in acquiring an education, an additional deduction of \$500 shall be allowed at line 7. For each child over the age of eighteen, engaged in acquiring an education, an additional deduction of \$500 at line 7. For each person (other than mentioned above) for whose support the taxpayer is legally liable, and who is actually and solely supported by and totally dependent upon and actually and permanently domiciled with the taxpayer an additional \$500 while such dependent is engaged solely in acquiring an education, and \$200 in other cases.
6. When an individual by reason of minority, or other disability, is unable to make his own return, it may be made for him by his duly authorized representative.
7. Amounts charged on line 21 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 26 must not exceed the deterioration of the property in one year.
8. On line just under your name address on first sheet, give name of county in which principal property is located from which income is reported.
9. Taxes under this return are due and payable upon the 15th day of June and become delinquent if not paid on or before the 1st day of July next following.
10. If the taxes under this return are not paid on or before July 1st, a warrant will be issued to the sheriff of the proper county for collection.
11. Taxes delinquent under this return are a lien upon all the property of the taxpayer both real and personal, and subject to the same penalties and provisions as ad valorem tax.
12. The law provides that all revisions and corrections of reports filed must be made before the first Monday in June following the filing of such reports, hence all returns must be filed in this office on or before June 4, and no request for correction or revision will be entertained by this office after said date.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments of F. A. Gillespie
for the Years 1915, 1916, 1917, and 1918.

Consolidated.

A Full, True, Correct, and Complete Transcript of the Pleas, Pleadings, Orders, Judgments, Decrees, Filings, Actions, and Ruling and Proceedings in the Above-entitled Matters, Proceedings, or Causes Before the Auditor of the State of Oklahoma.

Be it remembered, that heretofore, to-wit, on the 6th day of February, A. D., 1920, said F. A. Gillespie filed before and with said Auditor of the State of Oklahoma his Supplemental Returns of his next net annual income, and of his income, for the years 1915, 1916, 1917 and 1918, which said Supplemental Returns for said years are in words and figures following:

Here follows reproduction of supplemental return of net annual income by F. A. Gillespie for the year 1915, marked pages 20-26, inclusive.)

27 *Supplemental Sheets, Space Being Insufficient in Printed Form.*

Your Taxpayer herein and hereby claims, alleges and shows that his said income hereinbefore supplementarily set forth, and particularly that part as shown in and by Item 12 of this Supplemental Return, in the sum of One Hundred and Thirty-One Thousand, Eight Hundred and Sixty-Six Dollars and Ninety-Seven Cents (\$131,866.97), is exempt from taxation by the State of Oklahoma; that said State has no power, right or authority, under and by virtue of the Statutes in that behalf provided, to impose, assess, levy and collect any income tax whatsoever upon said income, and that such Statutes imposing, or purporting, pretending or attempting to impose, such tax upon such income, are null, void, and of no force and effect, and are unconstitutional, and in violation and contravention of the Constitution, Laws, Treaties, and Agreements of the United States of America, and of the Constitution of the State of Oklahoma, and said Auditor is wholly without power, right or authority to review and revise the Return heretofore made by your Taxpayer, and accepted by said Auditor, and to revise the assessment heretofore made, and to collect any further, other or additional tax or penalties, or both, from your Taxpayer for the year 1915, and, as grounds and reasons therefor, avers, alleges and shows as follows:

That your Taxpayer is now, and at all the time herein mentioned has been, the part owner of, and the co-lessee in, and all said income hereinbefore set forth and claimed as exempt from taxation by the State of Oklahoma is and was derived solely from, the following oil and gas mining lease, which lease was subject to the approval of, and has been approved by, the Secretary of the Department of the Interior of the United States of America, on and covering restricted Indian lands, to-wit:

An oil and gas mining lease, dated March 3rd, A. D., 1912, approved by the Department of the Interior on December 13th, A. D. 1912, on and covering the South Half ($\frac{1}{2}$) of the South Half ($\frac{1}{2}$) of the North Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$), and the South Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$) Section Five (5), Township Seventeen (17) North, Range Twelve (12) East, lying, being and situate in Creek County, Oklahoma, being restricted Indian lands, made and executed by Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, under authority of the Acts of Congress, and the Treaties and Agreements with said Indians, and under the Rules and Regulations of the Department of the Interior of said United States, with the approval of said Secretary of the Interior, to Mannford Oil & Gas Company, and thereafter assigned by said company, under authority of the same Acts, Treaties, Agreements, Rules and Regulations, and with the approval of the

28 Secretary of the Interior, to your Taxpayer and the Gypsy Oil Company, each owning an undivided one-half thereof, and at all times operating said lease under and in accordance with

said Rules and Regulations, promulgated and in force under and by virtue of the Acts of Congress in that behalf provided.

That said lease is on and covers restricted Indian Lands, which are owned by said Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, and said Indians maintain tribal relations, and are wards of the Government of the United States, and said Jackson Barnett is a ward of said Government, and his said lands are restricted Indian lands under the laws of said United States, and, in operating the said lands for oil and gas, your Taxpayer and his co-lessee are doing so under a lease made by an Indian citizen of the Creek Nation or Tribe of Indians, in accordance with the Rules and Regulations of the Department of the Interior, and the provisions of the various Indian Treaties and Agreements with said Indians, and the Acts of Congress, and under a lease which has been duly and regularly approved by the Department of the Interior, or the Secretary thereof, and is acting as the agent of said Indian and ward of said Government, and as the agent of the Department of the Interior, or the Secretary thereof, and as the agent of the Government of the United States, and it was, and is, and will be, the duty of said Government of the United States to operate and develop said lands, or to provide for the operation and development thereof, for the production of oil and gas therefrom for the benefit of its said ward, and to see that the oil and gas therefrom, is not wasted and destroyed, and your Taxpayer and his co-owner and co-lessee are operating said lands and producing oil and gas therefrom, under and in accordance with provisions of said lease, and of the Rules and Regulations of the Department of the Interior, and the Treaties and Agreements with said Indians, and the various Acts of Congress relating thereto, and pay a royalty provided for in and by said lease to the Indian Agent or Superintendent in charge of said Nation or Tribe of Indians, the Representative and Agent of said Department of the Interior, or the Secretary thereof, and of the citizens and members of said Tribe, and the royalty when so paid to said Indian Agent or Superintendent, is held by said Indian Agent or Superintendent, under and in accordance with the Rules and Regulations prescribed and promulgated by said Secretary of the Interior, and the various Acts of Congress in regard thereto, and paid out to such Indian in such sums and by such methods as the Secretary of the Interior may order and direct, and in accordance with said Rules and Regulations governing and controlling the same, and the provisions of the various Acts of Congress of the United States with reference to the same.

That, under the Treaties and Agreements of the United States with the said Creek Nation or Tribe of Indians, and under the Act of Congress of May 27th, 1908, said Indian owner of said lands set out and described in said lease, has no right or authority to make oil and gas mining leases covering said lands, except as provided in said Treaties, Agreements and Acts of Congress, and said Rules and Regulations of the Department of the Interior, or the Secretary thereof, governing and controlling the same; that said Indian owner

is a ward of the said United States as to his said restricted lands, and that said land must be operated and developed for oil, gas and other mineral purposes, under and in accordance with said Treaties and Agreements, said Acts of Congress, and not otherwise.

That, under the Constitution and Laws of the United States, the Indian Nations or Tribes inhabiting the State of Oklahoma, the individual members thereof, and the lands and property of said Indian, are under the sole and exclusive jurisdiction of the United States of America, except so far as such jurisdiction may be surrendered to the State of Oklahoma, and that, as to the Indian owner of the lands described in said lease, said United States, as to their jurisdiction, have not surrendered jurisdiction thereof and thereover to the State of Oklahoma.

That, under and by virtue of the Act of Congress of June 16th, 1906, being an Act, among other things, to enable the people of Oklahoma Territory and of the Indian Territory to form a Constitution and State Government, and to be admitted into the Union on equal footing with the original States, by Section 3 thereof, it was expressly provided that the people of said proposed State of Oklahoma should forever disclaim all right and title to all lands lying within the limits of said State, owned or held by any Indian Nation or Tribe, and that the same should remain subject to the jurisdiction, disposal and control of the United States, and the Constitution of the State of Oklahoma, in Section 3, of Article I, expressly disclaims any right or title to lands belonging to any Indian Nation or Tribe, and provides that the same should remain subject to the jurisdiction, disposal, and control of said United States, and, by reason of all the premises, all the lands hereinabove described in and covered by said lease, at all times have been, and are now, subject to the jurisdiction, disposal and control of said United States.

That, under the Constitution and Laws of the United States of America, Indians maintaining tribal relations, and individual Indians, under the jurisdiction and control of the said United States, and of United States Indian Agents or Superintendents, or of other representatives of said United States, are, as to their restricted
30 lands, wards of said United States, and under its control and jurisdiction, and the State of Oklahoma has no power, right or authority to pass any laws affecting the property rights of any of said Indians as to their restricted lands, and the owner of said lands set out and described in and by said lease, is an Indian maintaining tribal relations, and is an Indian under the jurisdiction and control of said Government of the United States, and of the said Indian Agents or Superintendents, and is of the degree of blood mentioned in the Act of May 27th, 1908, which makes his lands restricted lands; that his said lands are restricted lands, under and by virtue of the various Indian Treaties and Agreements with said Indians, and of said Act of May 27th, 1908, and other Acts of Congress thereto relating, and that no law enacted and passed by the State of Oklahoma imposing a tax upon said lands, or the oil and gas mining lease thereon or both, directly or indirectly taxing either or both, or upon the use or occupancy of said lands, or any part

thereof, or on the oil and gas produced therefrom, or the income derived from said oil and gas or from said lease, or any part thereof, can subject the same to such tax or taxation, and the same, including such income, are not, and cannot be made, subject to any tax, direct or indirect, assessed or levied, or attempted to be assessed or levied thereon, by any law of the State of Oklahoma, or by the Auditor, or any officer, agent or representative of the State of Oklahoma, acting, purporting, or attempting to act under and by authority of any law of the State of Oklahoma, and that any law of the State of Oklahoma, assessing, levying or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or to authorize the assessment or levy, of, any tax, directly or indirectly, upon such property, or upon its use and occupancy, or the income therefrom, is opposed to and in violation and contravention of the Constitution and Laws of the United States, and the Treaties and Agreements, by it made with said Indians, and of the Constitution of the State of Oklahoma.

That your Taxpayer, as the part owner of, and co-lessee, in, said lease, and said lease, then and there became, at all times has been, is now, and will be in the future, the agent or instrumentality of said Government of the United States, and the agent or instrumentality of said Indian citizen, and a means employed by said Congress of the United States to carry into effect the powers conferred upon it by said Constitution of the United States, and your taxpayer then and there became, and at all times herein mentioned has been, is now, and will be in the future, engaged in the occupation as and of such agent of said Government of the United States, and of said Indian Ward of said Government, and there was then and there granted to your Taxpayer, and your Taxpayer has since been, and is now exercising, and will in the future exercise privileges, licenses, and franchises to him so granted by said United States, as such agent, instrumentality and means.

That any tax imposed upon the income derived from said lease upon said restricted lands of said citizen or member of the Creek Nation or Tribe of Indians and upon the income herein claimed to be exempt, would be and is a tax upon an instrumentality or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and would be and is a tax upon an agency of said United States, and would be and is a tax upon a privilege or occupation upon and exacted from an instrumentality of the United States, acting under authority from and granted by Congress of said United States, and exercised by your Taxpayer under and by virtue of the Constitution and Laws of the United States, and would be and is a tax upon an agent of said United States Government and his occupation as such, and would be and is a tax upon the income from property, when the property itself is exempt from taxation by the State of Oklahoma, and would be and is a tax substantially and in effect upon said lease and property from which said income is derived, the same being exempt from taxation by the State of Oklahoma, and would be and is a tax indirectly imposed by the State of Oklahoma, when it cannot

directly impose such tax, and would be and is a tax upon the powers and operations of the Government of the United States, or property held in trust by it for its said Indian ward, and Statutes or Laws of the State of Oklahoma, and particularly the act of the Legislature of Oklahoma approved March 17, 1915, Chapter 164, Session Laws, 1915, beginning on page 232, and the Act of said Legislature, approved March 2, 1917, Chapter 265, Session Laws, 1917, beginning on page 486, and all Acts amendatory thereof and thereto, assessing or levying, or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or authorize the assessment or levy of, any such income tax upon the aforesaid income, herein and hereby claimed to be exempt from such taxation by the State of Oklahoma, and the income derived from said lease on said restricted Indian lands, and from the oil and gas produced from said lands under said lease, and as to said income and as operating upon and subjecting the same to taxation by the State of Oklahoma, are opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements it made with said Indians, and the Constitution of the State of Oklahoma, and are void, null, and of no force and effect whatsoever, and, by reason of all the premises, said State of Oklahoma, and the

Auditor of said State, and any officer, representative, or agent
32 of said State, are wholly without right, power or authority to assess, levy and collect any income tax or tax whatsoever upon said income, and said income is absolutely exempt from such and all taxation by said State of Oklahoma.

That, unless said income derived from and by reason of said lease on said restricted Indian Lands, and from the oil and gas thereon and thereby produced, shall be included as a part of the income of your Taxpayer, taxable by the State of Oklahoma, no other, further, or additional taxes are, or can be, made to appear as now, or ever having been, due, or to become due, from your Taxpayer, and, by reason of all the premises, said income aforesaid, and herein and hereby claimed to be exempt from taxation by the State of Oklahoma, is and must be eliminated from the income of your Taxpayer taxable by said State of Oklahoma, and said State, and its said Auditor, are wholly without power, right or authority to include said income in and as a part of the taxable income of your Taxpayer, who has already paid all, and more than, he should have paid on his said income for the year 1915.

The said Auditor did not revise said Original Return made to him by your Taxpayer for the year 1915, and notify your Taxpayer of any such revision on or before the first Monday in May following, to-wit, the first Monday in May, 1916, but said Auditor completed the assessment of income returned by your Taxpayer for the year 1915, and computed the tax thereon on or before the first Monday in June, 1916, and your taxpayer paid the tax assessed and computed thereon by said Auditor, and, by reason of all the premises, said State of Oklahoma, and said Auditor thereof, and each and both of them, are without right, power or authority to now, or hereafter, revise said Original Return and to make any assessment upon such

X-----X
 : To be filled in by State Auditor. :
 : :
 : Assessment List No..... :
 : Page.....Line..... :
 : File No..... :
 : Audited by..... :
 X-----X

Above space is to be stamped by
 Auditor showing date received.

SUPPLEMENTAL RETURN OF NET ANNUAL INCOME BY F. A. GILLESPIE
IN CONNECTION WITH RETURN HERETOFORE MADE BY HIM FOR
THE YEAR 1916, CLAIMING NET INCOME SHOWN BY THIS
SUPPLEMENTAL RETURN EXEMPT FROM TAXATION BY
STATE OF OKLAHOMA.

F. A. GILLESPIE, (hereinafter for convenience referred to as the Taxpayer,) having heretofore regularly made return of his annual net income to the Auditor of the State of Oklahoma, (hereinafter for convenience referred to as the Auditor), for the year 1916, which was duly assessed, and the tax thereon computed by said Auditor, and paid by said Taxpayer, within the time required by law, but said Auditor now believing and claiming that said Taxpayer did not return and pay upon as much net income as he should have returned and paid upon, and said Taxpayer claiming and alleging that he returned and paid upon all the net income, which the State of Oklahoma was and is entitled to impose, assess and collect an income tax upon, and claiming and alleging that the income which he has heretofore not returned for taxation was exempt from taxation by the State of Oklahoma, and that the Statutes of the State of Oklahoma imposing, purporting or attempting to impose, a tax upon such income, are void, null and of no force and effect, and in violation and contravention of the Constitution, Laws, Treaties, and Agreements of the United States of America, and of the Constitution of the State of Oklahoma, yet, nevertheless, that said Auditor may have the full facts with reference thereto, and may have before him the income of said Taxpayer in its entirety, said Taxpayer hereby makes this Supplemental Return, in connection with his said Return for the year 1916, heretofore made, at all times protesting, claiming and alleging and willing to show, and in no wise waiving, that said income, for which no Return has heretofore been made, and no income tax paid thereon, is exempt from taxation by said State of Oklahoma, and that the Statutes of Oklahoma imposing, or purporting, pretending or attempting to impose, any income tax or penalties or both, upon the income herein and hereby disclosed and set forth in this Supplemental Return as so exempt, or any income tax or penalties, or both, in addition to the taxes already imposed, assessed, levied and collected upon the income set forth and disclosed in his said Original Return for said year 1916, are null, void and of no force and effect, and are in violation and contravention of said Constitution, Laws, Treaties, and Agreements of said United States, and of said Constitution of the State of Oklahoma, and that said State of Oklahoma, and its said Auditor, Officers, Representatives and Agents, are without right, power or authority to impose, assess, levy and collect such additional taxes or penalties, or both, upon such income of said taxpayer, so claimed to be exempt, that part of this Supplemental Return, together with the supplemental sheets added thereto, disclosing, stating and setting forth said income being upon the Regular Printed Form, prescribed and promulgated by said Auditor, modified as necessary, and with the consent of said Auditor, and to be a part hereof, and of the allegations, statements and averments following, all being and constituting said Taxpayer's Supplemental Return.

This is a State Report.

Return to State Auditor, Oklahoma City, Okla.

To be filled in by State Auditor

Assessment List No. _____
 Page _____ Line _____
 File No. _____
 Audited by _____

H. E. & L. Form No. 1817

IMPORTANT

Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

Above space to be stamped by Auditor showing date received.

THE PENALTY

For failure to have this return in the hands of the State Auditor on or before March 1st, 1917, \$100.00 in addition to the tax. (See Instructions on page 4).

INCOME TAX

DEPARTMENT OF STATE AUDITOR

State of Oklahoma

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS
 (As provided by Chap. 164, Sess. Laws 1915)

Income received during the year ended December 31, 1916

(NOTICE—WRITE NAME AND ADDRESS WITH TYPEWRITER IF POSSIBLE; IF NOT, PRINT IT)

Filed by (or for) F. A. GILLESPIE, of 325 Buluth
 (Street and Number)

Tulsa, Oklahoma,
 (Postoffice Address) (State)

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income to State of Oklahoma for the preceding year? Yes
 If so, give your residence? Are you single or married? Married Was wife of husband living with you on Dec. 31, of the year for which this return is rendered? Yes
 If married, give full name of wife or husband Maxi Gillespie
 Has your wife or husband, income from sources independent of your own? No
 Have you included your wife's or husband's income in this return? No

1. Gross income (brought from line 20) For Auditor See Supplemental Sheets
 2. General deductions (brought from line 28) Same as 1.
 3. Net income Same as 1.

SPECIFIC DEDUCTION

	Amount
4. Specific exemption of \$3,000 to an individual	3,000 00
5. Specific exemption of \$1,000 if living with spouse	1,000 00
6. Specific exemption of \$300 for each child under the age of 18 years	300 00
7. Specific exemption claimed for dependents, permanently domiciled with taxpayer	
8. Total deduction and exemption lines (4-5-6-7)	
9. Taxable income	\$4,300.00

Note:—If separate return is made by husband or wife Husband \$ _____ and exemption is prorated, state amount claimed by: Wife \$ _____

COMPUTATION OF TAX ON NET INCOME

	Income	Tax
(a) On the first \$10,000 1 per cent		
(b) On the next \$15,000 2 per cent		
(c) On the next \$25,000 3 per cent		
(d) On the next \$50,000 4 per cent		
(e) On all amounts in addition to the foregoing 5 per cent		
Total tax to be paid		

xState on separate sheet (a) the number of such dependents; (b) the age of each; (c) the number engaged solely in acquiring an education and (d) the legal liability of taxpayer to support each of such dependents.

GROSS INCOME.

This statement must show in the proper space the ENTIRE AMOUNT of gains, profits and income received by the individual arising or accruing from all sources during the preceding calendar year and the income from all property owned, and of every business, trade or profession carried on in this State by persons residing elsewhere. EXCEPT such income as is exempt from taxation hereunder by some law of the United States or of this State, and the compensation of public officers for public service in such cases where the taxation thereof would be repugnant to the constitution.

In computing the income and deductions, the income of the wife shall be added to the income of her husband, and the income of each child under eighteen years of age, to that of its parent, or parents when the wife is not living separately from the husband or the child separately from the parent or parents.

DESCRIPTION OF INCOME.

GROSS INCOME

10. Salaries and wages		
Wife's income		
Children's income		
11. Profession and vocations		
Wife's income		
Children's income		
12. Business, trade, commerce or sales or dealings in property, whether real or personal. Not returned in original return. Income from real estate. Indian lands, and claimed as exempt from Children's income taxation. See supplemental sheets following.	293,720	64
13. Rents. Returned in original return and tax paid thereon. See supplemental sheet following.	3,615	67
14. Interest on notes, mortgages, bonds, bank deposits or evidence of debt of any kind whatsoever. Returned in original return and tax paid on wife's income thereon.	28,101	75
15. Dividends on stock or corporations, joint stock companies and associations.		
Wife's income		
Children's income		
16. Fiduciaries (income received from guardians, trustees, executors, administrators, agents, receivers, conservators, or other persons acting in a fiduciary capacity).		
Wife's income		
Children's income		
17. Partnership, gains and profits whether distributed or not. Returned in original return erroneously under item of on Children's income line 12, and now transferred, and tax paid thereon.	95,593	75
18. Royalties from mines, oil wells, patents, franchises or other legalized privileges.		
Wife's income		
Children's income		
19. All other sources not enumerated.		
Wife's income		
Children's income		
NOTE: State here sources from which income entered on line 19 is received and amount received from each.		

20. Total (enter total of column on line 1) Left for Auditor to fill in.
See supplemental sheet's following.

**SUPPLEMENTAL SHEETS, EXPLANATORY OF ITEMS GIVEN ON PRINTED
FORM, CONNECTING SUPPLEMENTAL WITH ORIGINAL RETURN.
SPACE BEING INSUFFICIENT IN PRINTED FORM.**

NOTE.

(Items given on these Supplemental Sheets are given under and with Numbers given on Printed Form, with the understanding words with such Number on Printed Form are made a part of each Item as if written herein, and Items belong to class therein described, and the words used are in addition to those used on Printed Form.)

GROSS INCOME.

12. Supplemental and Departmental Income from Departmental Leases on restricted Indian Lands, not heretofore returned for taxation, claimed to be exempt from taxation. See supplemental sheets following,-----	\$293,720.64
13. Returned in original return, and tax paid thereon,-----	3,615.67
14. Returned in original return, and tax paid thereon,-----	28,101.20
17. Returned in original return, but erroneously under Item 12, but now transferred here, and tax paid thereon,-----	95,593.62
20. (a) TOTAL , being Item 12, Departmental Income, exempt from taxation, and should not be included by Auditor in ascertaining Item 20 on Line 20, to be entered in Item 1, on line 1,-----	293,720.64
(b) TOTAL , Items 13, 14 and 17, and should be entered by Auditor in Item 20, or on line 20,-----	127,310.75
(c) TOTAL , Items 12, 13, 14 and 17, thus including Departmental Income, which Taxpayer claims is exempt, together with income already taxed, which should not be entered by Auditor in Item 20, on line 20,-----	421,050.26

GENERAL DEDUCTIONS.

21. (a) Supplemental, but allowable if tax be rightfully imposed on Item 12, and allowed by Auditor's Examiner, when considering original return and taxpayer's books,-----	158,323.63
21. (b) Included in (a) above, but allowable in any event, and if Item 12 be eliminated, as it should be, applicable to other Items on such elimination,-----	66,558.78
23. Returned in original return erroneously as \$3,125.52, but correctly, and allowed by Auditor's Examiner when considering Taxpayer's original return and books, and allowable in any event,-----	10,339.46
24. Supplemental, and erroneously omitted in Original return, but allowed by Auditor's Examiner, when considering original return, and Taxpayer's books, and allowable in any event,-----	53,183.31

26. (a) Supplemental, but allowed by Auditor's Examiner, when considering original return and Taxpayer's books, and allowable in entirety if Item 12 be taxed,-----\$ 21,158.43
 (b) Included in (a) above, but allowable in any event, and if Item 12 be eliminated, as it should be, applicable to other Items on such elimination,----- 4,757.70
27. Supplemental, but allowable if tax be imposed on Item 12, and allowed by Auditor's Examiner when considering Taxpayer's original return and books,----- 14,686.03
28. (a) Total general deductions, Items 21 (a), 23, 24 and 26 (a), allowable in any event, which should be entered by Auditor in Item 2, or on line 2,----- 134,658.25
- A. Item 20 (b) being less than Item 28, (and showing no taxable income), and, therefore, Item 28 less Item 20 (b), showing excess of deductions over income,----- 7,327.63

GENERAL DEDUCTIONS.

Note: Claims for deductions cannot be allowed unless the information required below is clearly set out.

21. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any <i>individual business</i> . (There must not be included under this head personal, living or family expenses, business expenses of partnership or cost of merchandise. Amounts paid for permanent improvements or betterment of property are not proper expense deductions) <i>Supplemental. See supplemental sheets preceding</i> Wife's deduction Children's deduction Note: State on the following lines the principal business in which the above expenses were incurred.	158,323	63
22. All interest paid within the year on personal indebtedness of taxpayer Wife's deduction Children's deduction		
23. All State, county, school and municipal taxes paid within the year (not including those assessed against local benefits) <i>See supplemental sheets preceding</i> Wife's deduction Children's deduction	10,339	46
24. Losses actually sustained during the year incurred in trade, or arising from fires or storms and not compensated by insurance or otherwise <i>Supplemental. See supplemental sheets preceding and following.</i> Wife's deduction Children's deduction Note: State (a) of what the loss consisted, (b) when it was actually sustained, and (c) how it was determined to be a loss.	53,183	31
25. Debts due to the taxpayer actually ascertained to be worthless and charged off at the end of the year Wife's deduction Children's deduction Note: State (a) of what the debts consisted, (b) when they were created (c) when they became due, and (d) how they were actually determined to be worthless. (Give this information for the <i>exhaustion, wear and tear of property arising out of its use or employment in business</i> . No deduction shall be made for any amount of expenses of restoring property or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return <i>Supplemental. See supplemental sheets preceding and following</i> Wife's deduction Children's deduction Note: State (a) what the property was on which depreciation was taken, (if buildings, state when erected, of what material constructed and value of same as of Jan. 1st of the calendar year for which this return is rendered), (d) what percentage of depreciation is claimed.	21,158	43
27. Amount allowed to cover depletion, in case of mines and oil wells not to exceed 5 per cent of the gross value at the mine or well of the output for the calendar year for which this return is rendered <i>Supplemental. See supplemental sheets preceding and following</i> Wife's deduction Children's deduction Note: State (a) cost of mine or well, (b) gross value at the mines or well, of the output for the calendar year for which this return is rendered, and (c) what percentage of depletion is claimed.	14,686	03
28. Total general deduction (to be entered on line 2) Left to auditor to fill Note: If space is insufficient for answering any question attach a supplemental sheet to this return.		

4

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING THIS RETURN.

STATE OF _____, COUNTY OF _____, ss:

being first duly sworn according to law, deposes and says: that the foregoing return contains a full, true, correct and complete statement of all gains, profits and income received by _____ during the year for which the said return is made: that the said _____ is entitled to all the deductions and exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, same being an Act providing for an income tax. Further, affiant sayeth, not.

Subscribed and sworn to before me this _____ day of _____, 19 _____

(SEAL)

Official capacity.

INSTRUCTIONS.

1. This return shall be made by each and every person in this State, having a **net income** of \$3,000 or over, for the taxable year.
2. This return shall be made by each and every person **residing outside the State**, deriving a **net income from property owned and business, trade or profession carried on in this State**, of \$3,000 or over, for the taxable year.
3. This return shall be filed with the State Auditor on or before the first day of March of each year.
4. This return shall show the net income of the taxpayer for the calendar year ending December 31st, last preceding, and shall be sworn to by taxpayer. Affidavit may be made before any officer **authorized by law** to administer oaths.
5. An unmarried individual or married individual not living with husband or wife shall be allowed an exemption of \$3,000. Where husband and wife live together they shall be allowed jointly a total exemption of only \$4,000. In addition to the foregoing, an exemption of \$300 shall be allowed for each child under the age of eighteen. For each child and every person for whose support the taxpayer is legally liable and who is actually and solely supported by and totally dependent upon and actually and permanently domiciled with the taxpayer an additional \$500 while such dependent is engaged solely in requiring an education, and \$200 in other cases.
5. When an individual by reason of minority, or other disability is unable to make his own return, it may be made for him by his **duly authorized** representative.
7. Amounts charged on line 21 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 26 must not exceed the deterioration of the property in one year.
8. Taxes under this return are due and payable upon the 15th day of June, and become delinquent if not paid on or before the 1st day of July next following.
9. If the taxes under this return are not paid on or before July 1st, a warrant will be issued to the sheriff of the proper county for collection.
10. Taxes delinquent under this return is a lien upon all the property of the taxpayer both real and personal and subject to the same penalties and provisions as ad valorem tax.

revised return, and to assess, levy and collect any additional tax or taxes upon the income of your Taxpayer for the year 1915.

Wherefore, and by reason of all the premises, your Taxpayer hereby claims his said income, as shown by this Supplemental Return, derived from and by reason of said lease on said restricted Indian lands, and from the oil and gas thereon and thereby produced, is exempt and free from taxation by the State of Oklahoma, and that the State of Oklahoma, and its said Auditor, acting for it, are wholly without right, power or authority to tax said income and are wholly without such right, power or authority at this time, and in this proceeding, to revise his said original return for the year 1915, and to assess, levy and collect any additional taxes or penalties, or both, upon the income of your Taxpayer for the year 1915.

F. A. GILLESPIE,
By PEARL KIMBLE,
His Agent.

33 STATE OF OKLAHOMA,
County of Tulsa, ss:

Pearl Kimble, being first duly sworn according to law, deposes and says: That she is the agent of said F. A. Gillespie, and, as such is authorized to, and makes, this affidavit, for him and in his behalf; that at all the times mentioned in the foregoing return, she kept his books, and is personally acquainted with the facts, figures, matters and things therein set forth and stated, and has a personal knowledge thereof, and that said F. A. Gillespie is now, and for some time will be, absent from the County of Tulsa, and State of Oklahoma; that the foregoing Supplemental Return contains a full, true, correct and complete statement of all gains, profits and income received by F. A. Gillespie during the year for which said Supplemental Return is made, and of the income which said F. A. Gillespie claims is exempt and free from taxation by the State of Oklahoma, and the reasons and grounds therefor, and that said F. A. Gillespie is entitled to all the exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, the same being an Act providing for an income tax. Further affiant saith not.

PEARL KIMBLE.

Subscribed and sworn to before me this the 30th day of January, A. D., 1920.

My commission expires April 10, 1921.

[SEAL.]

N. C. CROSS,
Notary Public.

(Here follows reproduction of supplemental return of net annual income by F. A. Gillespie for the year 1916, marked pages 34-40, inclusive.)

41 *Supplemental Sheets, Space Being Insufficient in Printed Form.*

Your taxpayer herein and hereby claims, alleges and shows that his income hereinbefore supplementarily set forth, and particularly that part as shown in and by Item 12 of this Supplemental Return, in the sum of Two Hundred and Ninety-Three Thousand, Seven Hundred and Twenty Dollars and Sixty-Four Cents (\$293,720.64), is exempt from taxation by the State of Oklahoma; that said State has no power, right or authority, under and by virtue of the Statutes in that behalf provided, to impose, assess, levy and collect any income tax whatsoever upon said income, and that such Statutes imposing or purporting, pretending or attempting to impose, such tax upon such income, are null, void, and of no force and effect, and are unconstitutional, and in violation and contravention of the Constitution, Laws, Treaties and Agreements of the United States of America, and of the Constitution of the State of Oklahoma, and said Auditor is wholly without power, right or authority to review and revise the return heretofore made by your Taxpayer, and accepted by said Auditor and to revise the assessment heretofore made, and to collect any further, other or additional tax or taxes, or penalties, or both, from your Taxpayer for the year 1916, and, as grounds and reasons, therefor, avers, alleges, and shows as follows:

That your taxpayer is the owner or part owner of, or the lessee or co-lessee in, and all the income hereinbefore set forth and claimed to be exempt from taxation by the State of Oklahoma, is derived solely from, the following oil and gas mining leases, or oil mining leases, which leases, and each of them, were subject to the approval of, and have been approved by, the Secretary of the Interior, on and covering restricted Indian lands, respectively, hereinafter described:

1. An oil and gas mining lease, dated March 3rd, 1912, approved by the Department of the Interior, or Secretary thereof, on December 13th, 1912, on and covering the South Half ($\frac{1}{2}$) of the North Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$) and the South Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$), Section Five (5), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Creek County, Oklahoma, being restricted Indian lands, made and executed by Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, under authority of the Acts of Congress, and the Treaties and Agreements with said Indians, and under the Rules and Regulations of the Department of the Interior of the said United States, with the approval of the Secretary of the Interior, to Mannford Oil & Gas Company, and thereafter assigned by said Company, under authority of the same Acts, Treaties,

42 Agreements, and Rules and Regulations, with the approval of said Secretary of the Interior, to your taxpayer and the Gypsy Oil Company, each owning an undivided one-half thereof, and at all times operating said lease under and in accordance with said Rules and Regulations in that behalf provided.

2. An Oil Mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13th, 1916, on and covering the Northeast Quarter ($\frac{1}{4}$) (Lot 107), Section Eight (8), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

3. An Oil Mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter, Section Five (5), Township Twenty (20), North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

4. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress, approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter (Lot 94) Section Three (3), Township Twenty-One (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

5. An Oil mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter (Lot 102), Section Thirty (30),
43 Township Twenty-One (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

6. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest and Charles W. Grimes an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and ap-

proved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter (Lot 103), Section Thirty-Two (32), Township Twenty-One (21), North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

7. An Oil mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie an undivided three-fourths interest and Charles W. Grimes an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter (Lot 104), Section Thirty-one (31), Township Twenty-One (21) North, Range Twelve (12), East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

8. An Oil Mining Lease, dated the 28th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1916, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, and in pursuance of Section 5 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter (Lot 104), Section Thirty-two (32) Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being, and situate in Osage County, Oklahoma.

That said lease, mentioned in Paragraph 1, preceding, is on and covers restricted Indian lands, which are owned by said Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, and said Indians maintain tribal relations, and are wards of the Government of the United States, and said Jackson Barnett is a ward of said Government, and his said lands are restricted lands under the laws

44 of the United States, and, in operating the said lands for oil and gas, your Taxpayer and his co-lessee are doing so under a lease made by an Indian Citizen of the Creek Nation or Tribe of Indians, in accordance with the Rules and Regulations of the Department of the Interior, and the provisions of the various Indian Treaties and Agreements with said Indians, and the Acts of Congress, and under a lease which has been duly and regularly approved by the Department of the Interior, or the Secretary thereof, and are acting as the agent of said Indian and ward of said Government, and as the agent of the Government of the United States, in producing said oil and gas from said restricted Indian lands; that said lands described in and covered by said lease are owned by said Indian citizen, who is a ward of the Government of the United States, and it was, and is, and will be, the duty of said Government of the United States to operate and develop said lands, or to provide for the opera-

tion and development thereof, for the production of oil and gas therefrom for the benefit of its said ward, and to see that the oil and gas therefrom is not wasted and destroyed, and your Taxpayer and his co-owner or co-lessee are operating said lands, and producing oil and gas therefrom, under and in accordance with the provisions of said lease, the Treaties and Agreements with said Indians, and the various Acts of Congress relating thereto, and pay a royalty provided for in and by said lease to the Indian Agent or Superintendent in charge of said Nation or Tribe of Indians, and of the citizens and members thereof, the Representative and Agent of said Department of the Interior, or the Secretary thereof, and of the citizens and members of said Nation or Tribe of Indians, and the royalty, when so paid to said Agent or Superintendent, is by him held under and in accordance with said Rules and Regulations prescribed and promulgated by said Secretary of the Interior, and the various Acts of Congress in regard thereto, and paid out to such Indians in such sums and by such methods as the Secretary of the Interior may order and direct, and in accordance with said Rules and Regulations governing and controlling the same, and the provisions of the various Acts of Congress of the United States with reference to the same.

That, under the Treaties and Agreements of the United States with said Creek Nation or Tribe of Indians, and under the Act of Congress of May 27, 1908, said Indian Owner of said lands set out and described in said lease, has no right or authority to make oil and gas mining leases covering his said lands, except as provided in said Treaties and Agreements and Acts of Congress, and said Rules and Regulations of the Department of the Interior, or of the Secretary thereof, governing and controlling the same; that said Indian

45 Owner is a ward of the said United States as to his said restricted lands, and that said lands must be operated and developed for oil, gas and other mineral purposes under and in accordance with said Treaties and Agreements, said Acts of Congress and said Rules and Regulations, and not otherwise.

That said leases, mentioned in Paragraphs 2 to 8 hereof, inclusive, preceding, are on and cover lands on what is now known as Osage County, Oklahoma, but which was formerly known as and was Osage Reservation, and Indian Reservation; that for a long time prior to June 28, 1906, said Osage County, Oklahoma, was said Indian Reservation, and had been granted by the United States of America to the Osage Tribe or Nation of Indians as a reservation for the use and benefit of such Tribe or Nation under the Constitution and laws of said United States, and in pursuance of Treaties and Agreements made between it and said Tribe or Nation of Indians, and all lands now embraced in said Osage County had been patented to said Tribe or Nation of Indians, and set apart as an Indian Reservation for the sole and exclusive use and occupancy of said Tribe or Nation of Indians, and the members and citizens thereof, and by them held in common.

That, on said June 28, 1906, the Congress of the United States passed an Act providing for the allotment of the lands of said

Indian Reservation to the individual members of said Tribe or Nation, which Act, among other things, provided that nothing therein contained should authorize the sale of oil, gas, coal or other minerals covered by said lands, reserving to the use of said Tribe or Nation for a period of Twenty-five years all such oil, gas, and other minerals, the royalty to be paid said Tribe or Nation, as in said Act provided, and providing that the oil, gas, coal and other minerals in and upon said lands should become the individual property of said individual owners at the expiration of said period of twenty-five years, unless otherwise provided by Congress; that said Act further provides that all oil, gas, coal and other minerals covered by said lands should be reserved to said Tribe or Nation of Osage Indians, for a period of twenty-five years from and after the 8th day of April, 1916, and leases for oil, gas, coal and other minerals covered by selections, divisions and allotment of said lands, provided for in and by said Act, might and should be made by said Osage Tribe of Indians through its Tribal Council, and with the approval of the Secretary of the Interior, and under such Rules and Regulations as he should prescribe, and said Osage leases, hereinabove mentioned and referred to, have been so made; that the royalties to be paid to said Tribe or Nation for any such oil, gas and other mineral leases should be determined by the President of the United

States, and providing that no mining or prospecting should be permitted on the homestead selections provided for in said Act, without the written consent of the Secretary of the Interior, and that all funds belonging to the said Osage Tribe or Nation, and all moneys due, and all moneys that might become due or that might thereafter be found to be due to the Osage Tribe or Nation of Indians, should be held in trust by the United States for the benefit of said Tribe or Nation for a period of Twenty-five years from and after the 1st day of January, 1907, except as otherwise in said Act provided, and further providing that all moneys received as royalties from oil, gas and other minerals produced from the lands of said Osage Tribe or Nation should be placed in the Treasury of the United States to the credit of the Osage Tribe or Nation of Indians, and that the same should be paid out and distributed to the individual members of said Tribe or Nation, in accordance with and in the manner prescribed in said Act.

That said Osage Tribe or Nation of Indians is now, and was at the time of the execution of each and all of said oil mining leases, the ward of the United States of America, and the members and citizens thereof wards of said United States as to their restricted property and rights, and under the control, direction and supervision of the Department of the Interior, and the Secretary thereof, and under the direct control and management of the Indian Superintendent or Agent of said Indians, who had, and has, general control, supervision and management of all the business or affairs of said Tribe or Nation, and the individual members thereof, and of the operations on said lands of said Tribe or Nation, and of the lands of the individual members and citizens thereof, for all oil, gas and minerals of said individual members and citizens thereof, for all oil, gas and mineral

conducted under his supervision and control, and that the Department of the Interior, and the Secretary thereof, and all the moneys, funds and royalties belonging to said Tribe or Nation, or which may hereafter belong to or become due to said Osage Tribe or Nation, were, have been, are, and will be, under the control and management of the United States, and were, have been, are, and will be, paid into the Treasury of the United States to be paid out in the manner prescribed by law, and in accordance with the Rules and Regulations prescribed, and to be prescribed, by the Secretary of the Interior, and such Rules and Regulations, at all the times herein mentioned, have been and are now, in full force and effect; that the United States, being the ultimate owner of the fee in the land embraced in said Osage Reservation, holding the same in trust for the use and benefit of said Indians, as Trustee for them, it became, was, is, and will be the duty of said United States to develop, or to see that the lands belonging to said Nation or Tribe of Indians, and being a part of said Reservation, were, are, and will be developed for oil and gas mining purposes, and that the interest of said Tribe or Nation, and the members and citizens thereof, in and to the oil, gas and other minerals underlying the lands of their Reservation and any royalty to be produced therefrom, should be protected, subserved and prevented from going to waste, and that the proceeds thereof should be properly applied to the maintenance, care and support of said Indians, and, under the laws of the United States, the funds and royalties of said Indians are to be paid into the Treasury of the United States, and are to be used and expended for the purposes above named, under the supervision and control of the United States and its duly appointed Representatives and Agents.

That all the above oil mining leases have been duly approved by the Secretary of the Interior, under and by virtue and in pursuance of said Acts of Congress, and the Rules and Regulations prescribed and promulgated by the Secretary of the Interior, and said leases and the lands covered by them, are being operated by your Taxpayer, or by him and his co-owners or co-lessees, and the oil produced therefrom, under said laws, Treaties and Agreements, and Rules and Regulations.

That, under the Constitution and Laws of the United States, the Indian Nations or Tribe inhabiting the State of Oklahoma, and the individual members thereof, and the lands and property of said Indians are under the sole and exclusive jurisdiction of the United States of America, except so far as such jurisdiction may be surrendered to the State of Oklahoma, and that, as to said Indian Owner of the lands described in said lease, mentioned in Paragraph 1 hereof, and as to said Tribe or Nation of Osage Indians, the lands described in said leases covering their lands or selections or allotments, the said United States as to their jurisdiction, have not surrendered their jurisdiction thereof and thereover to the State of Oklahoma.

That, under and by virtue of the Acts of Congress of June 16th, 1906, being an act among other things, to enable the people of

Oklahoma Territory and of the Indian Territory to form a Constitution and State Government, and to be admitted into the Union on equal footing with the original States, by Section 3 thereof, it was expressly provided that the people of said Proposed State of Oklahoma should forever disclaim all right and title to all lands lying within the limits of said State, owned or held by any Indian Nation or Tribe, and that the same should remain subject to the

jurisdiction, disposal and control of the United States, and
48 the Constitution of the State of Oklahoma, in Section 3 of

Article I, expressly disclaims any right or title to lands belonging to any Indian Nation or Tribe, and provides that the same shall remain subject to the jurisdiction, disposal and control of said United States, and, by reason of all the premises, all the lands hereinbefore described in and covered by said leases, at all times have been, and are now subject to the jurisdiction, disposal and control of said United States.

That, under the Constitution and Laws of the United States, Indians maintaining tribal relations, and individual Indians, under the jurisdiction and control of the United States, and of the United States Indian Agents or Superintendents, or other representatives of the United States, are, as to their restricted lands and property rights, wards of said United States, and under its control and jurisdiction, and the State of Oklahoma has no power, right or authority, to pass any laws affecting the property rights of any of said Indians as to their restricted lands and property rights, and said Jackson Barnett, the Indian owner of the lands described in said lease mentioned in Paragraph 1 hereof, is an Indian maintaining tribal relations, and said Osage Tribe or Nation of Indians, and the individual members thereof are a Tribe or Nation of Indians maintaining tribal relations, and said Indian, said Tribe or Nation, and the individual members thereof, are under the jurisdiction and control of said Government of the United States, and of said Indian Agents or Superintendents or Representatives of said United States; that said Indian, Jackson Barnett, is of the degree of blood mentioned in said Act of May 27th, 1908, which makes his lands restricted Indian lands, and said Act of June 28, 1906, makes the lands of the Osage Tribe or Nation of Indians, and of the individual members thereof, restricted Indian lands, and said Act of June 28, 1906, makes the lands of the Osage Tribe or Nation of Indians, and of the individual members thereof, restricted Indian lands; that all of said lands set forth and described in said leases are restricted Indian lands, under and by virtue of the various Indian Treaties and Agreements with said Indians, and said Act of May 27, 1908, and said Act of June 28, 1906, and other Acts of Congress relating thereto, and that no law enacted and passed by the State of Oklahoma imposing a tax upon said lands, or the oil and gas mining leases thereon, or both, directly or indirectly, taxing either or both, or upon the use or occupancy of said lands, or any part thereof, or on the oil and gas produced therefrom, or the income derived from said oil and gas or from said leases or lands, or any part thereof, can subject the same to such tax or taxation, and the same, including such in-

come, are, and cannot be made, subject to any tax, direct or indirect, assessed or levied, or attempted to be assessed or levied, thereon by any law of the State of Oklahoma, or by the Auditor, or any officer, agent or representative of the State of Oklahoma, acting, pur-
49 reporting, or attempting, to act, under and by authority of any law of the State of Oklahoma, and that any law of the State of Oklahoma, assessing, levying, or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or to authorize the assessment or levy of, any tax directly or indirectly, upon such property, or upon its use and occupancy, or the income therefrom, is opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution of the State of Oklahoma.

That your Taxpayer, as the part owner of, or co-lessee in, said leases, together with said leases, then and there became, at all times has been, and is now, and will in the future be, the agent or instrumentality of said Government of the United States, and the agent or instrumentality of said Tribe or Nation of Osage Indians, and the members and citizens thereof, and of said Indian citizen, and a means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and your Taxpayer then and there became, at all times herein mentioned has been, is now, and will in the future be, engaged in the occupation as and of such agent of said Government, and of said Indian wards of said Government, and there was then and there granted to your Taxpayer, and your Taxpayer has since been, and is now exercising, and in the future will exercise, privileges, licenses, and franchises to him so granted by said United States, as such agent, instrumentality and means.

That any tax imposed upon the income derived from said leases upon said restricted Indian lands of said citizen or member of said Creek Nation or Tribe, and of said Osage Nation or Tribe of Indians, and the members and citizens thereof, and upon the income herein claimed to be exempt, would be and is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and would be and is a tax upon an agency of the United States, and would be and is a tax upon a privilege or occupation upon and enacted from an instrumentality of the United States, and would be and is a tax upon a license or franchise granted by said United States, and exercised by your Taxpayer under and by virtue of the Constitution and laws of said United States, and would be and is a tax upon an agent of the United States Government and his occupation as such, and would be and is a tax upon the income from property, when the property itself is exempt, by reason of the
50 Constitution and Laws of the United States, from taxation by the State of Oklahoma, and would be and is a tax substantially in effect, upon the lease and property, from which said income is derived, the same being exempt from taxation by the State of Oklahoma, and would be and is a tax indirectly imposed

by the State of Oklahoma, when it cannot directly impose such a tax, and would be and is a tax upon the powers and operations of the Government of the United States, and would be and is a tax upon property of the United States, or property held in trust by it for its said Indian wards, and Statutes and Laws of the State of Oklahoma, and particularly the Act of the Legislature, approved March 17, 1915, Chapter 164, Session Laws, 1915, beginning on Page 232, and the Act of the Legislature, approved March 2, 1917, Chapter 265, Session Laws 1917, beginning on Page 486, and all Acts amendatory thereof and thereto, assessing or levying, or authorizing the assessment or levy of, or purporting, pretending, or attempting to assess or levy, or authorize the assessment or levy of, any such tax upon the aforesaid income, herein and hereby claimed to be exempt from such taxation by the State of Oklahoma, are opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution of the State of Oklahoma, and are void, null, and of no force and effect whatsoever, and, by reason of all the premises, said State of Oklahoma, and the Auditor of said State, and any officer, agent or representative of said State, are wholly without right, power or authority to assess, levy and collect any income tax or tax whatsoever upon said income, and said income is absolutely exempt from such and all taxation.

That, unless said income derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, shall be included as a part of the income of your Taxpayer, taxable by the State of Oklahoma, no other, further, or additional taxes are, or can be, made to appear as now, or ever having been, assessable, or rightfully to be levied, on said income for the year 1916, or due, or to become due, from your Taxpayer, and, by reason of all the premises, said income aforesaid, and herein and hereby claimed to be exempt from taxation by the State of Oklahoma, and said State, and its Auditor, are wholly without power, right or authority to include said income in and as a part of the taxable income of your Taxpayer, who has already paid all, and more than, he should have paid on his said income for said year 1916.

That said Auditor did not revise said original return made to him by your taxpayer for the year 1916, and notify your Taxpayer of any such revision on or before the first Monday in May following, to-wit, the first Monday in May, 1917, but said Auditor completed the assessment of income returned by your Taxpayer for the year 1916, and computed the tax thereon on or before the first Monday in June, 1917, and your Taxpayer paid the Tax assessed and computed thereon by said Auditor, and, by reason of all the premises, said State of Oklahoma, is so exempt, and said Auditor thereof, and each and both of them, are without right, power or authority to now, or hereafter, revise said original return, and to make any assessment upon such revised return, and to assess, levy and collect any additional tax or taxes upon the income of your Taxpayer for the year 1916.

x-----x
 : To be filled in by State Auditor, :
 : :
 : Assessment List No..... :
 : Page.....Line..... :
 : File No..... :
 : Audited by..... :
 x-----x

Above space is to be stamped by
 Auditor showing date received.

SUPPLEMENTAL RETURN OF NET ANNUAL INCOME BY E. A. GILLESPIE
IN CONNECTION WITH RETURN HERETOFORE MADE BY HIM FOR
THE YEAR 1917, CLAIMING NET INCOME SHOWN BY THIS
SUPPLEMENTAL RETURN EXEMPT FROM TAXATION BY
STATE OF OKLAHOMA.

E. A. GILLESPIE, (hereinafter for convenience, referred to as the Taxpayer), having heretofore regularly made return of his annual net income to the Auditor of the State of Oklahoma, hereinafter for convenience referred to as the Auditor, for the year 1917, which was duly assessed, and the tax thereon computed, by said Auditor, but said Auditor now believing and claiming that said Taxpayer did not return and pay upon as much net income as he should have returned and paid upon, and said taxpayer claiming and alleging that he returned and paid upon all, and more than, the net income, which the State of Oklahoma was and is entitled to impose, assess and collect an income tax upon, and claiming and alleging that he erroneously and without obligation, returned income for taxation, which was and is exempt from taxation by the State of Oklahoma, and that he has already paid taxes thereon, which said State was not entitled to collect, and said State cannot assess, levy and collect any other, further or additional taxes upon said income, and that your Taxpayer had no other taxable income upon which additional taxes can be assessed, levied and collected, and that the Statutes of the State of Oklahoma imposing, purporting, or attempting to impose, a tax upon such income, are void, null and of no force and effect, and in violation and contravention of the Constitution, Laws, Treaties and Agreements of the United States of America, and of the Constitution of said State of Oklahoma, yet, nevertheless, that said Auditor may have the full facts with reference thereto, and may have before him the income of said Taxpayer in its entirety, said Taxpayer hereby makes this Supplemental return, in connection with his said return for the year 1917, heretofore made, at all times protesting, claiming and alleging, and willing to show, and in no wise waiving, that said income, claimed herein as exempt, is exempt from taxation by said State of Oklahoma, and that the Statutes of Oklahoma imposing, or purporting, pretending or attempting to impose, any income tax or penalties, or both, upon the income herein and hereby disclosed and set forth in this Supplemental Return as so exempt, or any income or penalties, or both, in addition to the taxes already imposed, assessed, levied and collected upon the income set forth and disclosed in his said original return for said year 1917, are null, void, and of no force and effect, and are in violation and contravention of said Constitution of the State of Oklahoma, and that said State of Oklahoma, and its said Auditor, Officers, Representatives and Agents, are without right, power or authority to impose, assess, levy and collect such additional taxes or penalties, or both, upon such income of said Taxpayer, so claimed to be exempt, that part of this Supplemental return, together with the supplemental sheets added thereto, disclosing, stating and setting forth said income being upon the Regular Printed Form, prescribed and promulgated by said Auditor, modified as necessary, and with the consent of said Auditor, and to be a part hereof, and of the allegations, statements and averments following, all being and constituting said Taxpayer's Supplemental Return.

THIS IS A STATE REPORT RETURN TO STATE AUDITOR, Oklahoma City, Oklahoma.

To Be Filled In By State Auditor

Assessment List No. _____
Page _____ Line _____
File No. _____
Audited by _____

S. E. & L., Form 1247

PERSONAL CHECKS

will NOT be

Accepted in payment of
income tax

IMPORTANT

Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

THE PENALTY

For failure to have this return in the hands of the State Auditor on or before March 1st, 1918 \$5.00 for each day delinquent in addition to the tax. (See Instructions on page 4.)

INCOME TAX

DEPARTMENT OF STATE AUDITOR

State of Oklahoma
RETURN OF ANNUAL NET INCOME OF INDIVIDUALS
Income received during the Year ended December 31st, 1917

(NOTICE—Write Name and Address With Typewriter If Possible; If Not, Print It)

Filed by (or for) F. A. GILLESPIE, of 420 Kennedy-Bldg.
(Street and Number)

Tulsa, Oklahoma,
(Post Office Address) (State)

Give name of county in which principal income producing property is located. County.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income to State of Oklahoma for the preceding year? Yes
If so, give your residence. 325 Duluth Are you single or married? Married
Was wife or husband living with you on Dec. 31, of the year for which this return is rendered? Yes
If married, give full name of wife or husband. Maud Gillespie
Has your wife, or husband, income from sources independent of your own? No
Have you included your wife's or husband's income in this return?

1. Gross income (brought from line 20) _____
2. General deductions (brought from line 28) _____
3. Net income _____

SPECIFIC REDUCTION

4. Specific exemption of \$3,000 to an individual. 3,000-00
5. Specific exemption of \$1,000 if living with spouse. 1,000-00
6. Specific exemption of \$300 for each child under the age of 18 years
7. Specific exemption claimed for dependents, permanently domiciled with taxpayer
8. Total deduction and exemptions (lines 4-5-6-7) \$4,000-00
9. Taxable income

NOTE:—If separate return is made by husband or wife Husband \$ _____
and exemption is prorated, state amount claimed by: Wife - \$ _____

COMPUTATION OF TAX ON NET INCOME

- (a) On the first \$10,000 4-1/2 per cent (74 mills) - 1 per cent
 - (b) On the next \$15,000 1 1/2 per cent (15 mills)
 - (c) On all amounts in addition to the foregoing 2 per cent (20 mills)
- Total tax to be paid _____

State on separate sheet (a) the number of such dependents; (b) the age of each; (c) the number engaged solely in acquiring an education, and (d) the legal liability of taxpayers to support each of such dependents.

54 *on the next \$25,000 3 per cent,*
54 *on the next \$50,000 4 per cent,*
54 *on all amounts in addition to the foregoing, 5 per cent*

GROSS INCOME

This statement must show in the proper space the ENTIRE AMOUNT of gains, profits and income received by the individual arising or accruing from all sources during the preceding calendar year and the income from property owned, and in every business, trade or profession carried on in this State by persons residing elsewhere. EXCEPT such income as is exempt from taxation hereunder by some law of the United States or this State, and the compensation of public officers for public service in such cases where the taxation thereof would be repugnant to the constitution.

In computing the income and deductions, the income of the wife shall be added to the income of her husband, and the income of each child under eighteen years of age to that of its parent, or parents when the wife is not living separately from the husband and the child separately from the parent or parents.

DESCRIPTION OF INCOME	Gross Income
10. Salaries and wages ----- Wife's income ----- Children's income -----	----- ----- -----
11. Profession and vocations ----- Wife's income ----- Children's income -----	----- ----- -----
12. Business, trade, commerce or sales or dealings in property, whether real or personal, give kind of business engaged in. Supplemental and Departmental, --- Wife's income claimed as exempt. --- See supplemental sheets following. --- Children's income ing. ---	----- ----- ----- 1,307,979.39 ----- -----
13. Rents Returned in original return and tax paid thereon. See supplemental sheets following. Wife's income ----- Children's income -----	----- ----- ----- 6,689.00 ----- -----
14. Interest on notes, mortgages, bonds, bank deposits or evidence of debt of any kind whatsoever Returned in original return, and tax paid thereon. Wife's income. See supplemental sheets following. Children's income -----	----- ----- ----- 30,547.11 ----- -----
15. Dividends on stock of corporations, joint stock companies and associations. Wife's income Returned in original return, and tax paid thereon. See --- Children's income supplemental sheets following, ---	----- ----- ----- 398.00 ----- -----
16. Fiduciaries (income received from guardians, trustees, executors, administrators, agents, receivers, conservators or other persons acting in a fiduciary capacity) --- Wife's income ----- Children's income -----	----- ----- ----- ----- ----- -----
17. Partnership gains and profits whether distributed or not Returned in original --- Wife's income --- and tax paid thereon. See supplemental sheets. --- Children's income following. ---	----- ----- ----- 102,230.63 ----- -----
18. Royalties from mines, oil wells, patents, franchises or other legalized privileges. Wife's income ----- Children's income -----	----- ----- ----- ----- ----- -----
19. All other sources not enumerated ----- Wife's income ----- Children's income -----	----- ----- ----- ----- ----- -----
Note—State here sources from which income entered on line 19 is received and amount received from each -----	

20. Total (enter total of column on line 1) Left to be filled in by Auditor	

See supplemental sheets following

SUPPLEMENTAL SHEETS, EXPLANATORY OF ITEMS GIVEN ON
PRINTED FORM, CONNECTING SUPPLEMENTAL WITH ORIGINAL
RETURN, SPACE BEING INSUFFICIENT IN THE
PRINTED FORM.

NOTE: (Items given on these Supplemental Sheets are given under and with Numbers given on Printed Form, with the understanding words with such numbers on such Form are made a part of each Item as if written herein, and Item belongs to class therein described, and the words used are in addition to those used on Printed Form.)

GROSS INCOME.

- | | | |
|-----|---|----------------|
| 12. | Supplemental and Departmental Income from Departmental Leases on restricted Indian Lands, erroneously, and without obligation, returned as part of Item 12 in original return, erroneously commingled with Items 13 and 17, erroneously embodied in said Item 12, but separated therefrom herein, claimed to be exempt from taxation. See supplemental sheets following,----- | \$1,307,979.39 |
| 13. | Returned in original return, but erroneously as a part of Item 12, but now transferred here, and tax paid thereon,----- | 6,600.00 |
| 14. | Returned in original return and tax paid thereon,----- | 30,547.11 |
| 15. | Returned in original return and tax paid thereon,----- | 398.00 |
| 17. | Returned in original return, but erroneously under Item 12, but now transferred here, and tax paid thereon,----- | 102,250.63 |
| 20. | (a) <u>TOTAL</u> , Item 12, Departmental Income, exempt from taxation, and should not be included by Auditor in ascertaining Item 20, on line 20, to be entered on line 1,----- | 1,307,979.39 |
| | (b) <u>TOTAL</u> , 13, 14, 15 and 17, thus excluding Departmental Income, which Taxpayer claims is exempt, and should be entered by Auditor in Item 20, or on line 20,----- | 139,775.74 |
| | (c) <u>TOTAL</u> , Items 12, 13, 14 and 15 and 17, thus including Departmental Income, which taxpayer claims is exempt, together with income not exempt, which should not be entered by Auditor in Item 20, on Line 20,----- | 1,447,775.13 |

GENERAL DEDUCTIONS.

- | | | |
|-----|--|------------|
| 21. | Supplemental, but Federal Income Tax, and other Items, which should have been included in following Items, excluded and transferred to other Items, amount now returned being allowable and allowed by Auditor's Examiner, when considering original return and Taxpayer's books,----- | 111,869.75 |
|-----|--|------------|

25. Returned in original return, but erroneously under Item 21, and now transferred, and allowed by Auditor's Examiner, when considering original return and Taxpayer's books, and allowable in any event,----- 11,979.57
24. Returned in original return as \$265,082.01, but here correctly and allowed by Auditor's Examiner, when considering original return, and Taxpayer's books, and allowable in any event,----- 267,222.77
26. Erroneously omitted in original return, or included in Item 21, but allowable, and allowed by Auditor's Examiner, when considering original return, and Examiner's books,----- 26,601.55
3,750.00
27. Erroneously omitted in original return, or included in Item 21, but allowable, and allowed by Auditor's Examiner, when considering original return and Taxpayer's books,----- 65,398.97
29. Total general deductions, Items 23, and 24, allowable in any event, which should be entered by Auditor in Item 2, or on line 2,----- 279,202.34
- A. Item 20 (b), being less than Item 26, (showing no taxable income), and, therefore, Item 28 less Item 20 (b), show in excess of general deductions over income, excluding income claimed to be exempt and deductions applicable thereto,----- 139,426.60
- B. Taxes erroneously and wrongfully assessed and levied on original return, and erroneously and without legal obligation paid by Taxpayer, to the credit and return of which he is in equity, good conscience, and right entitled, all of which the State, in equity and good conscience had no right to collect,----- 5,767.84

GENERAL DEDUCTIONS

NOTE:—Claims for deductions cannot be allowed unless the information required below is clearly set out.

21. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any individual business. (There must not be included under this head personal, living or family expenses, business expenses of partnership or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions. Donations not a proper deduction) Supplemental—See itemize expense in full—supplemental sheets preceding and following	11,869 95
22. All interest paid within the year on personal indebtedness of taxpayer	
Wife's deduction	
Children's deduction	
23. All State, county, school and municipal taxes paid within the year (not including those assessed against local benefits nor Federal income tax) Supplemental—Wife's deduction—See supplemental sheets preceding and following	11,979 57
Children's deduction	
24. Losses actually sustained during the year incurred in trade, or arising from fires or storms and not compensated by insurance or otherwise. Oil and mining leases are termed investments and not proper deductions if you still hold lease. Wife's deduction Supplemental—See supplemental sheets preceding and following	267,224 77
Children's deduction	
NOTE:—State (a) of what the loss consisted; (b) when it was actually sustained; and (c) how it was determined to be a loss.	
25. Debts due to the taxpayer actually ascertained to be worthless and charged off at the end of the year	
Wife's deduction	
Children's deduction	
NOTE:—State (a) of what the debt consisted; (b) when they were created; (c) when they become due, and (d) how they were actually determined to be worthless. (Give information on separate sheet.)	
26. Amount representing a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in business. No deduction shall be made for any amount of expenses of restoring property, or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return. Wear and tear, nor gasoline, nor upkeep on pleasure car not proper deduction Supplemental—See supplemental sheets preceding and following	26,601 55
Wife's deduction	3,750 00
Children's deduction	
NOTE:—State (a) what the property was on which depreciation was taken, (if buildings, state when erected, of what material constructed, and value of same as of January 1st of the calendar year for which this return is rendered); (b) what per cent of depreciation is claimed.	
27. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of individual's interest in the output for the calendar year for which this return is rendered Supplemental—Wife's deduction See supplemental sheets preceding and following	65,398 97
Children's deduction	
NOTE:—State (a) gross value at the mines or wells, of the output for the calendar year for which this return is rendered; (b) your interest in the output; and (c) what per cent depletion is claimed.	
Left to be filled in by Auditor See supplemental sheets preceding	
28. Total general deduction (to be entered on line 7)	
NOTE:—If space is insufficient for answering any question attach a supplemental sheet to this return.	

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING THIS RETURN

State of _____ County of _____, ss.

_____ being first duly sworn according to law, deposes and says.

That the foregoing return contains a full, true, correct and complete statement of all gains, profits and income received by _____ during the year for which the said return is made; that the said _____ is entitled to all the deductions and exemptions entered or claimed therein under the provisions of the income tax law. Further, affiant sayeth not.

Subscribed and sworn to before me this _____ day of _____, 19____

(Seal)

Official Capacity.

INSTRUCTIONS

1. This return shall be made by each and every person in the State having a net income of \$3,000 or over, for the taxable year.
2. This return shall be made by each and every person residing outside of State deriving a net income from property owned and business, trade or profession carried on in this State, of \$3,000 or over, for the taxable year.
3. This return shall be filed with the State Auditor on or before the first day of March of each year.
4. This return shall show the net income of the taxpayer for the calendar year ending December 31st, last preceding; and shall be sworn to by taxpayer. Affidavit may be made before any officer authorized by law to administer oaths.
5. An unmarried individual or married individual not living with husband or wife, shall be allowed an exemption of \$3,000. Where husband and wife live together they shall be allowed jointly a total exemption of only \$4,000. In addition to the foregoing, an exemption of \$300 shall be allowed at line 6 for each child under the age of eighteen, and if such child is engaged in acquiring an education, an additional deduction of \$500 shall be allowed at line 7. For each child over the age of eighteen, engaged in acquiring an education, an additional deduction of \$500 at line 7. For each person (other than mentioned above) for whose support the taxpayer is legally liable and who is actually and solely supported by and totally dependent upon and actually and permanently domiciled with the taxpayer an additional \$500 while such dependent is engaged solely in acquiring an education, and \$200 in other cases.
6. When an individual by reason of minority, or other disability, is unable to make his own return, it may be made for him by his duly authorized representative.
7. Amounts charged on line 21 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 26 must not exceed the deterioration of the property in one year.
8. On line just under your name address on first sheet, give name of county in which principal property is located from which income is reported.
9. Taxes under this return are due and payable upon the 15th day of June and become delinquent if not paid on or before the 1st day of July next following.
10. If the taxes under this return are not paid on or before July 1st, a warrant will be issued to the sheriff of the proper county for collection.
11. Taxes delinquent under this return are a lien upon all the property of the taxpayer both real and personal, and subject to the same penalties and provisions as ad valorem tax.
12. The law provides that all revisions and corrections of reports filed must be made before the first Monday in June following the filing of such reports, hence all requests for revision or correction must be filed in this office before said first Monday in June, and no request for correction or revision will be entertained by this office after said date.

Wherefore, and by reason of all the premises, your Taxpayer claims his said income, as shown by this Supplemental Return, derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, is exempt, and free from taxation by the State of Oklahoma, and that the State of Oklahoma, and its said Auditor acting for it, are wholly without right, power or authority at this time, and in this proceeding, to revise his said original return for the year 1916, and to assess, levy and collect any additional tax, or penalties, or both, upon the income of your Taxpayer for the year 1916.

F. A. GILLESPIE,

By PEARL KIMBLE,

His Agent.

52 STATE OF OKLAHOMA,
County of Tulsa, ss:

Pearl Kimble, being first duly sworn according to law, deposes and says: That she is the agent of said F. A. Gillespie, and, as such is authorized to, and makes, this affidavit, for him and in his behalf; that, at all the times mentioned in the foregoing return, she kept his books, and is personally acquainted with the facts, figures, matters and things therein set forth, and that said F. A. Gillespie is now, and for some time will be, absent from the County of Tulsa, and State of Oklahoma; that the foregoing Supplemental Return contains a full, true, correct and complete statement of all the gains, profits and income received by said F. A. Gillespie during the year for which said Supplemental Return is made, and of the income which said F. A. Gillespie claims is exempt and free from taxation by the State of Oklahoma, and the reasons and grounds therefor, and that said F. A. Gillespie is entitled to all the exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, the same being an Act providing for an income tax. Further affiant sayeth not.

PEARL KIMBLE.

Subscribed and sworn to before me, this 30th day of January, A. D., 1920.

My commission expires April 19, 1921.

[SEAL.]

N. C. CROSS,
Notary Public.

(Here follows reproduction of supplemental return of net annual income by F. A. Gillespie for the year 1917, marked pages 53-59, inclusive.)

Wherefore, and by reason of all the premises, your Taxpayer claims his said income, as shown by this Supplemental Return, derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, is exempt, and free from taxation by the State of Oklahoma, and that the State of Oklahoma, and its said Auditor acting for it, are wholly without right, power or authority at this time, and in this proceeding, to revise his said original return for the year 1916, and to assess, levy and collect any additional tax, or penalties, or both, upon the income of your Taxpayer for the year 1916.

F. A. GILLESPIE,

By PEARL KIMBLE,

His Agent.

52 STATE OF OKLAHOMA,
County of Tulsa, ss:

Pearl Kimble, being first duly sworn according to law, deposes and says: That she is the agent of said F. A. Gillespie, and, as such is authorized to, and makes, this affidavit, for him and in his behalf; that, at all the times mentioned in the foregoing return, she kept his books, and is personally acquainted with the facts, figures, matters and things therein set forth, and that said F. A. Gillespie is now, and for some time will be, absent from the County of Tulsa, and State of Oklahoma; that the foregoing Supplemental Return contains a full, true, correct and complete statement of all the gains, profits and income received by said F. A. Gillespie during the year for which said Supplemental Return is made, and of the income which said F. A. Gillespie claims is exempt and free from taxation by the State of Oklahoma, and the reasons and grounds therefor, and that said F. A. Gillespie is entitled to all the exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, the same being an Act providing for an income tax. Further affiant sayeth not.

PEARL KIMBLE.

Subscribed and sworn to before me, this 30th day of January, A. D., 1920.

My commission expires April 19, 1921.

[SEAL.]

N. C. CROSS,
Notary Public.

(Here follows reproduction of supplemental return of net annual income by F. A. Gillespie for the year 1917, marked pages 53-59, inclusive.)

60 *Supplemental Sheets, Space Being Insufficient in Printed Form.*

Your Taxpayer herein and hereby claims, alleges and shows that his income hereinbefore supplementarily set forth, and particularly that part as shown in and by Item 12 of this Supplemental Return, in the sum of One Million, Three Hundred and Seven Thousand, Nine Hundred and Seventy-Nine Dollars and Thirty-Nine Cents, (\$1,307,979.39), is exempt from taxation by the State of Oklahoma; that said amount was erroneously and without obligation, included and returned in Item 12 of his original return for the year 1917, and was erroneously and wrongfully assessed by the State of Oklahoma for that year, and that said amount cannot now, or at any time, be rightfully and legally assessed and taxed by and with any additional tax whatsoever; that said State has no power, right, or authority, under and by virtue of the Statutes in that behalf provided, to impose, assess, levy and collect any income tax whatsoever upon said income, and that such Statutes imposing, or purporting, pretending or attempting to impose, such tax upon such income, are null, void and of no force and effect, and are unconstitutional, and in violation and contravention of the Constitution, Laws, Treaties, and Agreements of the United States of America, and of the Constitution of the State of Oklahoma, and said Auditor is wholly without power, right or authority to review and revise the return heretofore made by your Taxpayer, and accepted by said Auditor, and to revise the assessment heretofore made, and to collect any further, other or additional tax or taxes, or penalties, or both, from your Taxpayer for the year 1917, and, as grounds and reasons therefor, avers, alleges and shows, as follows:

That your Taxpayer is the owner or part owner of, or the lessee or co-lessee in, and all the income hereinbefore set forth and claimed to be exempt from taxation by the State of Oklahoma, is derived solely from, the following oil and gas mining leases, or oil mining leases, which leases, and each of them, were subject to the approval of, and have been approved by, the Secretary of the Interior, on and covering restricted Indian lands, respectively, hereinafter described.

1. An oil and gas mining lease, dated March 3rd, 1921, approved by the Department of the Interior, or Secretary thereof, on December 13, 1912, on and covering the South Half ($\frac{1}{2}$) of the North Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$) and the South Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$), Section Five (5), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Creek County, Oklahoma, being restricted Indian Lands, made and executed by Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, under authority of the Acts of Congress, and the Treaties and Agreements with said Indians, and under the Rules and Regulations of the Department of the Interior of said United States, with the approval of the Secretary of the Interior, to Mannford Oil & Gas Company, and

thereafter assigned by said Company, under authority of the same Acts, Treaties, Agreements, and Rules and Regulations, with the approval of said Secretary of the Interior, to your Taxpayer and the Gypsy Oil Company, each owning an undivided one-half thereof, and at all times operating said lease under and in accordance with said Rules and Regulations in that behalf provided.

2. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress, approved June 28, 1906, and approved by the Secretary of the Interior June 13th, 1916, on and covering the Northeast Quarter (Lot 107), section Eight, Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

3. An Oil Mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter, Section Five (5), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

4. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior, June 13, 1916, on and covering the Southeast Quarter (Lot 94), Section Three (3), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

5. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter (Lot 102), Section Thirty (30), Township Twenty one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

6. An Oil Mining lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part and F. A. Gillespie an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter (Lot 103) Section Thirty-two (32), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

7. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter (Lot 104) Section Thirty-one, (31), Township twenty-one (21) north, range twelve (12) east of the Indian Meridian, lying, being, and situate in Osage County, Oklahoma.

8. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior, June 13, 1916, on and covering the Southwest Quarter (Lot 104) Section thirty-two (32), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

9. An Oil Mining Lease dated the 4th day of July, A. D. 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter of Section Thirty-two (32), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

10. An Oil Mining Lease, dated the 21st day of November, A. D., 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council,

dated June 17, 1915, party of the first part, and F. A. Gillespie an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter of Section Six (6), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

11. An Oil Mining Lease, dated the 21st day of November, A. D., 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, and F. A. Gillespie an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter of Section Thirty-one (31), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

12. An Oil Mining Lease, dated the 21st day of November, A. D., 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter of Section (6) Township twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

That said lease, mentioned in paragraph 1, preceding, is on and covers restricted Indian Lands, which are owned by Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, and said Indians maintain tribal relations, and are wards of the Government of the United States, and said Jackson Barnett is a ward of said Government, and his said lands are restricted lands under the laws of the United States, and, in operating the said lands for oil and gas, your Taxpayer and his co-lessee are doing so under a lease made by an Indian citizen of the Creek Nation or Tribe of Indians, in accordance with the Rules and Regulations of the Department of the Interior, and the provisions of the various Indian Treaties and Agreements with said Indians, and the Act of Congress, and under a lease which has been duly and regularly approved by the Department of the Interior, or the Secretary thereof, and are acting as the agent of said Indian and ward of said Government, and as the agent of the Government of the United States, in producing said oil and gas from said restricted Indian Lands; that said lands described in and covered by said lease are owned by said Indian citizen, who is a ward of the Government of the United States, and it was, and is, and will be, the duty of said Government of the United

States to operate and develop said lands, or to provide for the operation and development thereof, for the production of oil and gas therefrom for the benefit of its said ward, and to see that the oil and gas therefrom is not wasted and destroyed, and your Taxpayer and his co-owner or co-lessee are operating said lands, and producing oil and gas therefrom, under and in accordance with the provisions of said lease, the Treaties and Agreements with said Indians, and the various Acts of Congress relating thereto, and pay a royalty provided for in and by said lease to the Indian Agent or Superintendent in charge of said Nation or Tribe of Indians, and of the citizens and members thereof, the Representative and Agent of said Department of the Interior, or the Secretary thereof, and of the citizens and members of said Nation or Tribe of Indians, and the royalty, when so paid to said Agent or Superintendent is by him held under and in accordance with said Rules and Regulations prescribed and promulgated by said Secretary of the Interior, and the various Acts of Congress in regard thereto, and paid out to such Indians in such sums and by such methods as the Secretary of the Interior may order and direct, and in accordance with said Rules and Regulations governing and controlling the same, and the provisions of the various Acts of the Congress of the United States with reference to the same.

That under the Treaties and Agreements of the United States with said Creek Nation or Tribe of Indians, and under the Act of 65 Congress of May 27, 1908, said Indian Owner of said lands set out and described in said lease, has no right or authority to make oil and gas mining leases covering his said lands, except as provided in said Treaties and Agreements and Acts of Congress, and said Rules and Regulations of the Department of the Interior, or of the Secretary thereof, governing and controlling the same; that said Indian Owner is a ward of the said United States as to his said restricted lands, and that said land must be operated and developed for oil, gas and other mineral purposes under and in accordance with said Treaties and Agreements said Acts of Congress and said Rules and Regulations, and not otherwise.

That said leases, mentioned in Paragraphs 2 to 12, inclusive, preceding, are on and cover lands on what is now known as Osage County, Oklahoma, but which was formerly known as and was Osage Reservation, an Indian Reservation; that for a long time prior to June 28, 1906, said Osage County, Oklahoma, was said Indian Reservation, and had been granted by the United States of America to the Osage Tribe or Nation of Indians as a Reservation for the use and benefit of such Tribe or Nation under the Constitution and Laws of the United States, and in pursuance of Treaties and Agreements made between it and said Tribe or Nation of Indians, and all lands now embraced in said Osage County had been patented to said Tribe or Nation of Indians, and set apart as an Indian Reservation for the sole and exclusive use and occupancy of said Tribe or Nation of Indians, and the members and citizens thereof, and by them held in common.

That, on said June 28, 1906, the Congress of the United States passed an Act providing for the allotment of the lands of said Indian

Reservation to the individual members of said Tribe or Nation, which Act, among other things, provided that nothing therein contained should authorize the sale of oil, gas, coal or other minerals covered by said lands, reserving to the use of said Tribe or Nation for a period of Twenty-five years all such oil, gas, and other minerals, the royalty to be paid said Tribe or Nation as in said Act provided, and providing that the oil, gas, coal and other minerals in and upon said lands should become the individual property of said individual owners at the expiration of said period of twenty-five years, unless otherwise provided by Congress; that said Act further provides that all oil, gas, coal and other minerals covered by said lands should be reserved to said Tribe or Nation of Osage Indians for a period of twenty-five years from and after the 8th day of April, 1916, and all leases for oil, gas, coal and other minerals covered by selections, divisions and allotment of said lands, provided for in and by said Act, might and should be made by said Osage Tribe of Indians through its Tribal Council, and with the approval of the Secretary of the Interior, and under such Rules and Regulations as he should prescribe,

66 and said Osage leases, hereinbefore mentioned and referred to, have been so made; that the royalties to be paid to said Tribe or Nation for any such oil, gas and other mineral leases should be determined by the President of the United States, and providing that no mining or prospecting should be permitted on the homestead selections provided for in said Act, without the written consent of the Secretary of the Interior, and that all funds belonging to the said Osage Tribe of Indians, and all moneys due, and all moneys that might become due, or that might thereafter be found to be due to the Osage Tribe or Nation of Indians, should be held in trust by the United States for the benefit of said Tribe or Nation for a period of Twenty-five years from and after the 1st day of January, 1907, except as otherwise in said Act provided, and further providing that all moneys received as royalties from oil, gas and other minerals produced from the lands of said Osage Tribe or Nation should be placed in the Treasury of the United States to the credit of the said Osage Tribe or Nation of Indians, and that the same should be paid out and distributed to the individual members of said Tribe or Nation of Indians, *and that the same should be paid out and distributed to the individual members of said Tribe or Nation, in accordance with and in the manner prescribed in said Act.*

The said Osage Tribe or Nation of Indians is now, and was at the time of the execution of each and all of said oil mining leases, the ward of the United States of America, and the members and citizens thereof wards of said United States as to their restricted property and rights, and under the control, direction and supervision of the Department of the Interior, and the Secretary thereof, and under the direct control and management of the Indian Superintendent or Agent, of said Indians, who had, and has, general control, supervision and management of all the business and affairs of said Tribe or Nation, and the individual members thereof, and of the operations on said land of said Tribe or Nation, and of the lands of the individual members and citizens thereof, for all oil, gas and minerals

purposes, and all said operations have been, are now, and will be, conducted under his supervision and control, and that of the Department of the Interior, and the Secretary thereof, and all the moneys, funds and royalties belonging to said Tribe or Nation, or which may hereafter belong to or become due to said Osage Tribe or Nation, were, have been, are, and will be, under the control and management of the United States, and were have been, are, and

67 will be, paid into the Treasury of the United States, to be paid out in the manner prescribed by law, and in accordance with the Rules and Regulations prescribed, and to be prescribed by the Secretary of the Interior, and such Rules and Regulations, at all the times herein mentioned, have been, and are now, in full force and effect; that the United States, being the ultimate owner of the fee of the land embraced in said Osage Reservation, holding the same in trust for the use and benefit of said Indians, as Trustee for them, it became, was, is, and will be, the duty of said United States to develop, or to see that the lands belonging to said Nation or Tribe of Indians, and being a part of said Reservation, were, are and will be developed for oil and gas mining purposes, and that the interest of said Tribe or Nation, and the members and citizens thereof, in and to the oil, gas and other minerals underlying the lands of their said Reservation, and any royalty to be produced therefrom, should be protected, subserved and prevented from going to waste, and that the proceeds thereof should be properly applied to the maintenance, care and support of said Indians, and, under the Laws of the United States, the funds and royalties of said Indians are to be paid into the Treasury of the United States, and are to be used and expended for the purposes above named, under the supervision and control of the United States and its duly appointed Representatives and Agents.

That all the above oil mining leases have been duly approved by the Secretary of the Interior, under and by virtue and in pursuance of said Acts of Congress, and the Rules and Regulations prescribed and promulgated by the Secretary of the Interior, and said leases and the lands covered by them, are being operated by your Taxpayer, or by him and his co-owners or co-lessees, and the oil produced therefrom, under said laws, Treaties and Agreements, and Rules and Regulations.

That under the Constitution and Laws of the United States, the Indian Nations or Tribes inhabiting the State of Oklahoma, and the individual members thereof, and the lands and property of said Indians, are under the sole and exclusive jurisdiction of the United States of America, except so far as such jurisdiction may be surrendered to the State of Oklahoma, and that, as to said Indian owner of the lands described in said lease, mentioned in paragraph 1 hereof, and as to the lands of said Tribe or Nation of Osage Indians, and the lands described in said leases covering their lands or selections or allotments, the said United States, as to their jurisdiction, have not surrendered their jurisdiction thereof and thereover to the State of Oklahoma.

That under and by virtue of the Act of Congress of June 16th,

1906, being an Act, among other things, to enable the people of Oklahoma Territory and of the Indian Territory to form a Constitution and State Government, and to be admitted into the Union on equal footing with the original States, by Section 3 of Article 1, thereof, it was expressly provided that the people of said proposed state of Oklahoma should forever disclaim all right and title to all lands lying within the limits of said State, owned or held by any Indian Nation or Tribe, and that the same should remain subject to the jurisdiction, disposal and control of the United States, and the Constitution of the State of Oklahoma, in Section 3 of Article 1, expressly disclaims any right or title to lands belonging to any Indian Nation or Tribe, and provides that the same shall remain subject to the jurisdiction, disposal and control of said United States, and, by reason of all the premises, all the lands hereinbefore described in and covered by said leases, at all times have been, and are now subject to the jurisdiction, disposal and control of said United States.

That, under the Constitution and Laws of the United States, Indians maintaining tribal relations, and individual Indians, under the jurisdiction and control of the United States, and of United States Indian Agents or Superintendents, or other representatives of the United States, are, as to their restricted lands and property rights, wards of said United States, and under its control and jurisdiction, and the State of Oklahoma has no power, right or authority to pass any laws affecting the property rights, and said Jackson Barnett, the Indian owner of the lands described in said lease mentioned in Paragraph 1 hereof, is an Indian maintaining tribal relations, and said Osage Tribe or Nation of Indians, and the individual members thereof are a Tribe or Nation of Indians maintaining tribal relations, and said Indian, said Tribe or Nation, and the individual members thereof, are under the jurisdiction and control of said Government of the United States, and of said Indian Agents or Superintendents or Representatives of said United States; that said Indian, Jackson Barnett, is of the degree of blood mentioned in said Act of May 27th, 1908, which makes his lands restricted Indian lands, and said Act of June 28, 1906, makes the lands of the Osage Tribe or Nation of Indians and of the individual members thereof, restricted Indian lands; that all of said lands set forth and described in said leases are restricted Indian lands, under and by virtue of the various Indian Treaties and Agreements with said Indians, and said Act of May 27, 1908, and said Act of June 28, 1906, and other Acts of Congress relating thereto, and that no law enacted and passed by the State of Oklahoma imposing a tax upon said lands, or the oil and gas mining leases thereon, or both, directly or indirectly taxing either or both, or upon the use or occupancy of said lands, or any part thereof, or on the oil and gas produced therefrom, or the income derived from said oil and gas or from said leases or lands, or any part thereof, can subject the same to such tax or taxation, and the same, including such income, are, and cannot be made, subject to any tax, direct or indirect, assessed or levied, or attempted to be assessed or levied, thereon, by any law of the State of Oklahoma, or by the Auditor, or any officer, agent or representative of the State

of Oklahoma acting, purporting or attempting to act, under and by authority of any law of the State of Oklahoma, and that any law of the State of Oklahoma, assessing, levying, or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or to authorize the assessment or levy of, any tax directly or indirectly, upon such property, or upon its use and occupancy, or the income therefrom, is opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution of the State of Oklahoma.

That your Taxpayer, as the part owner of, or co-lessee in, said leases, together with said leases, then and there became, at all times has been, and is now, and will in the future be, the agent or instrumentality of said Government of the United States, and the agent or instrumentality of said Tribe or Nation of Osage Indians, the members and citizens thereof, and of said Indian citizen, and a means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and your Taxpayer then and there became, at all times herein mentioned has been, is now, and will in the future be, engaged in the occupation as and of such agent of said Government, and of said Indian wards of said Government, and there was then and there granted to your Taxpayer, and your Taxpayer has since been, and is now exercising, and in the future will exercise, privileges, licenses and franchises to him so granted by said United States, as such agent, instrumentality and means.

That any tax imposed upon the income derived from said leases upon said restricted Indian lands of said citizen and member of said Creek Nation or Tribe, and of said Osage Nation or Tribe of Indians, and the members and citizens thereof, and upon the income herein claimed to be exempt, would be and is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and would be and is a tax upon an agency of the United States, and would be and is a tax upon a privilege or occupation upon and exacted from an instrumentality of the United States, and would be and is a tax upon a license or franchise granted by said United States, and exercised by your Taxpayer under and by virtue of the Constitution and Laws of said United States, and would be and is a tax upon an agent of the United States Government and his occupation as such, and would be and is a tax upon the income from property, when the property itself is exempt, by reason of the Constitution and laws of the United States, from taxation by the State of Oklahoma, and would be and is a tax, substantially and in effect, upon the lease and property, from which said income is derived, the same being exempt from taxation by the State of Oklahoma, and would be and is a tax indirectly imposed by the State of Oklahoma, when it cannot directly impose such tax, and would be and is a tax upon the powers and operations of the Government of the United States, and would be and is a tax upon property of the United States, or property held in trust by it for its said

Indian wards, and the Statutes and Laws of the State of Oklahoma, and particularly the Act of the Legislature, approved March 17, 1915, Chapter 164, Session Laws, 1915, beginning on page 232, and the Act of the Legislature, approved March 2, 1917, Chapter 265, Session Laws, 1917, beginning on page 486, and all Acts amendatory thereof and thereto, assessing or levying, or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or authorize the assessment or levy of, any such tax upon the aforesaid income, herein and hereby claimed to be exempt from such taxation by the State of Oklahoma, are opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution and of the State of Oklahoma, and are void, null and of no force and effect whatsoever, and, by reason of all the premises, said State of Oklahoma, and the Auditor of said State, and any officer, agent or representative of said State, are wholly without right, power or authority to assess, levy and collect any income tax or tax whatsoever upon said income, and said income is absolutely exempt from such and all taxation.

That, unless said income derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, shall be included as a part of the income of your Taxpayer, taxable by the State of Oklahoma, no other, further or additional taxes are, or can be made to appear as now, or ever having been, assessable, or rightfully levied, on said income for the year 1917, or due, or to become due, from your Taxpayer, and, by reason of all the premises, said income aforesaid, and herein and hereby claimed to be exempt from taxation by the State of Oklahoma, and said State, and its Auditor, are wholly without power, right or authority to include said income in and as a part of the taxable income of your Taxpayer, who has already paid all, and more than, he should have paid on his said income for said year 1917.

That said Auditor did not revise said original return made to him by your Taxpayer for the year 1917, and notify your Taxpayer of any such revision on or before the first Monday in May following, to-wit, the first Monday in May, 1918, but said Auditor completed the assessment of income returned by your Taxpayer for the year 1917, and computed the tax thereon on or before the first Monday in June, 1918, and your Taxpayer paid the tax assessed and computed thereon by said Auditor, and, by reason of all the premises, said State of Oklahoma, and said Auditor thereof, and each and both of them, are without right, power or authority to now, or hereafter, revise said original return, and to make any assessment upon such revised return, and to assess, levy and collect any additional tax or taxes upon the income of your Taxpayer for the year 1917.

Wherefore, and by reason of all the premises, your Taxpayer claims his said income, as shown by this Supplemental Return, derived

from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, is exempt and free from taxation by the State of Oklahoma, and that the State of Oklahoma, and its said Auditor acting for it, are wholly without right, power or authority at this time, and in this proceeding, to revise his said original return for the year 1917, and to assess, levy and collect any additional tax, or penalties, or both, upon the income of your Taxpayer for the year 1917.

F. A. GILLESPIE,
By PEARL KIMBLE,
His Agent.

72 STATE OF OKLAHOMA,
County of Tulsa, ss:

Pearl Kimble, being first duly sworn, according to law, deposes and says: That she is the agent of said F. A. Gillespie, and, as such is authorized to, and makes, this affidavit, for him and in his behalf; that, at all the times mentioned in the foregoing return, she kept his books, and is personally acquainted with the facts, figures, matters and things therein set forth, and that said F. A. Gillespie is now, and for some time, will be, absent from the County of Tulsa and State of Oklahoma; that the foregoing Supplemental Return contains a full, true, correct and complete statement of all the gains, profits and income received by said F. A. Gillespie during the year for which said Supplemental Return is made, and of the income which said F. A. Gillespie claims is exempt and free from taxation by the State of Oklahoma, and the reasons and grounds therefor, and that said F. A. Gillespie is entitled to all the exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, the same being an Act providing for an income tax. Further affiant sayeth not.

PEARL KIMBLE.

Subscribed and sworn to before me, this 30th day of January,
A. D., 1920.

My commission expires April 19, 1921.

[SEAL.]

N. C. CROSS,
Notary Public.

(Here follows reproduction of supplemental return of net annual income by F. A. Gillespie for the year 1918, marked pages 73-79, inclusive.)

x-----x
: To be filled in by State Auditor. :
: :
: Assessment List No..... :
: Page.....List..... :
: File No..... :
: Audited by..... :
x-----x

Above space is to be stamped by
Auditor, showing date received.

SUPPLEMENTAL RETURN OF NET ANNUAL INCOME BY F. A. GILLESPIE
IN CONNECTION WITH RETURN HERETOFORE MADE BY HIM FOR
THE YEAR 1918, CLAIMING NET INCOME SHOWN BY THIS
SUPPLEMENTAL RETURN EXEMPT FROM TAXATION BY
STATE OF OKLAHOMA.

F. A. GILLESPIE, (hereinafter for convenience referred to as the Taxpayer), having heretofore regularly made return of his annual net income to the Auditor of the State of Oklahoma, (hereinafter for convenience referred to as the Auditor) for the year 1918, which was duly assessed, and the tax thereon computed by said Auditor, but said Auditor now believing and claiming that said Taxpayer did not return and pay upon as much net income as he should have returned and paid upon, and said Taxpayer claiming and alleging that he returned and paid upon all, and more than, the net income, which the State of Oklahoma was and is entitled to impose, assess and collect an income tax upon, and claiming and alleging that he erroneously, and without obligation, returned income for taxation, which was and is exempt from taxation by the State of Oklahoma, and that he has already paid taxes thereon, which said State of Oklahoma was not entitled to collect, and said State cannot assess, levy and collect any other, further or additional taxes upon said income, and that your Taxpayer had no other taxable income upon which additional taxes can be assessed, levied and collected, and that the Statutes of the State of Oklahoma imposing, purporting or attempting to impose, a tax upon such income, are void, null and of no force and effect, and in violation and contravention of the Constitution, Laws, Treaties, and Agreements of the United States of America, and of the Constitution of the said State of Oklahoma, yet, nevertheless, that said Auditor may have the full facts with reference thereto, and may have before him the income of said Taxpayer in its entirety, said Taxpayer hereby makes this Supplemental Return, in connection with his said Return for the year 1918, heretofore made, at all times protesting, claiming and alleging, and willing to show, and in no wise waiving, that said income claimed herein as exempt, is exempt from taxation by the State of Oklahoma, and that the Statutes of Oklahoma imposing, or purporting, pretending or attempting to impose, any income tax or penalties, or both, upon the income herein and hereby disclosed and set forth in this Supplemental Return as so exempt, or any income tax or penalties, or both, in addition to the taxes already imposed, assessed, levied and collected upon the income set forth and disclosed in his said original return for said year 1917, are null, void and of no force and effect, and are in violation and contravention of said Constitution, Laws, Treaties, and Agreements of said United States, and of said Constitution of the State of Oklahoma, and that said State of Oklahoma, and its said Auditor, Officers, Representatives and Agents, are without right, power or authority to impose, assess, levy and collect such additional taxes or penalties, or both, upon such income of said Taxpayer, so claimed to be exempt, that part of this Supplemental Return, together with the supplemental sheets added thereto, disclosing, stating and setting forth said income, being upon the Regular Printed Form, prescribed and promulgated by said Auditor, modified as necessary, and with the consent of said Auditor, and to be a part hereof, and of the allegations, statements, and averments following, all being and constituting said Taxpayer's Supplemental Return.

THIS IS A STATE REPORT

RETURN TO STATE AUDITOR, Oklahoma City, Oklahoma.

To Be Filled In By State Auditor

Assessment List No. _____
 Page _____ Line _____
 File No. _____
 Audited by _____

S. E. & L., Form 1247

PERSONAL CHECKS

will NOT be

Accepted in payment of

income tax

IMPORTANT

Read this form through carefully. Fill in pages 2 and 3 before making entries on first page.

THE PENALTY

For failure to have this return in the hands of the State Auditor on or before March 1st ~~1919~~ ¹⁹¹⁸, \$100.00 ~~per day~~ ^{per cent} in addition to the tax. (See Instructions on page 4.)

INCOME TAX

DEPARTMENT OF STATE AUDITOR

State of Oklahoma

RETURN OF ANNUAL NET INCOME OF INDIVIDUALS

Income received during the Year ended December 31 ~~1918~~ ¹⁹¹⁸

(NOTICE—Write Name and Address With Typewriter If Possible; If Not, Print It)

Filed by (or for) E. A. Gillespie, of 420 Kennedy-Bldg.

(Street and Number)

Tulsa

(Post Office Address)

Oklahoma

(State)

Give name of county in which principal income producing property is located County.

COMPLETE ANSWERS SHOULD BE GIVEN TO THE FOLLOWING QUESTIONS.

Did you render a return of income to State of Oklahoma for the preceding year? Yes
 If so, give your residence 325 Daluth Are you single or married? Married
 Was wife or husband living with you on Dec. 31, of the year for which this return is rendered? Yes
 If married, give full name of wife or husband Maud Gillespie
 Has your wife, or husband, income from sources independent of your own? No
 Have you included your wife's or husband's income in this return?

- Gross income (brought from line 20) 3,000.00
- General deductions (brought from line 28) 1,000.00
- Net income 2,000.00

SPECIFIC REDUCTION

- Specific exemption of \$3,000 to an individual 3,000.00
- Specific exemption of \$1,000 if living with spouse 1,000.00
- Specific exemption of \$300 for each child under the age of 18 years
- Specific exemption claimed for dependents, permanently domiciled with taxpayer
- Total deduction and exemptions (lines 4-5-6-7) \$4,000.00
- Taxable income

NOTE:—If separate return is made by husband or wife and exemption is prorated, state amount claimed by: Husband \$ 2,000.00 Wife - \$ 2,000.00

COMPUTATION OF TAX ON NET INCOME

- On the first \$10,000 1.5 per cent
- On the next \$15,000 2.5 per cent
- On all amounts in addition to the foregoing 2 per cent (20 mills)

Total tax to be paid

Income

Tax

State on separate sheet (a) the number of such dependents; (b) the age of each; (c) the number engaged solely in acquiring an education; and (d) the legal liability of taxpayers to support each of such dependents.

On the next \$25,000 4 per cent.

On all amounts in addition to the foregoing 5 per cent.

2
GROSS INCOME

This statement must show in the proper space the ENTIRE AMOUNT of gains, profits and income received by the individual arising or accruing from all sources during the preceding calendar year and the income from property owned, and in every business, trade or profession carried on in this State by persons residing elsewhere. EXCEPT such income as is exempt from taxation hereunder by some law of the United States or this State, and the compensation of public officers for public service in such cases where the taxation thereof would be repugnant to the constitution.

In computing the income and deductions, the income of the wife shall be added to the income of her husband, and the income of each child under eighteen years of age to that of its parent, or parents when the wife is not living separately from the husband and the child separately from the parent or parents.

DESCRIPTION OF INCOME	Gross Income
10. Salaries and wages ----- Wife's income ----- Children's income -----	----- ----- -----
11. Profession and vocations ----- Wife's income ----- Children's income -----	----- ----- -----
12. Business, trade, commerce or sales or dealings in property, whether real or personal, give kind of business engaged in Supplemental and Departmental and Wife's income claimed as exempt See supplemental sheets following Children's income ing -----	----- 538,637 12 ----- -----
13. Rents - Returned in original return and tax paid thereon See supple Wife's income noted sheet following Children's income -----	7,200 00 ----- -----
14. Interest on notes, mortgages, bonds, bank deposits or evidence of debt of any kind whatsoever - Returned in original return and tax paid thereon Wife's income ----- See supplemental sheets following Children's income -----	8,182 88 ----- -----
15. Dividends on stock of corporations, joint stock companies and associations. Re- Wife's income turned in original return and tax paid thereon Children's income See supplemental sheets -----	1,534 75 ----- -----
16. Fiduciaries (income received from guardians, trustees, executors, administrators, agents, receivers, conservators or other persons acting in a fiduciary capacity) -- Wife's income ----- Children's income -----	----- ----- -----
17. Partnership gains and profits whether distributed or not - Returned in orig- Wife's income inal return and tax paid thereon See supplemental Children's income sheet -----	91,891 41 ----- -----
18. Royalties from mines, oil wells, patents, franchises or other legalized privileges -- Wife's income ----- Children's income -----	----- ----- -----
19. All other sources not enumerated ----- Wife's income ----- Children's income -----	----- ----- -----
Note—State here sources from which income entered on line 19 is received and amount received from each -----	
20. Total (enter total of column on line 1) left to be filled in by Auditor	-----

See supplemental sheets following

SUPPLEMENTAL SHEETS, EXPLANATORY OF ITEMS GIVEN ON PRINTED FORM, CONNECTING SUPPLEMENTAL WITH ORIGINAL RETURN
SPACE BEING INSUFFICIENT ON PRINTED FORM.

NOTE:

(Items given on these Supplemental Sheets are given under and with Numbers given on Printed Form, with understanding words with such Numbers on such Form are made a part of each Item as if written herein, and item belongs to class therein described, and words used are in addition to those used on Printed Form.)

GROSS INCOME.

12.	Supplemental and Departmental Income from Departmental Leases on restricted Indian Lands, erroneously, and without obligation, returned as Item 12, in original return. See supplemental sheets following,-----	\$ 538,637.12
13.	Returned in original return, and tax paid thereon,-----	7,200.00
14.	Returned in original return. and tax paid thereon,-----	8,182.88
15.	Returned in original return, and tax paid thereon,-----	1,534.75
17.	Returned in original return, and tax paid thereon,-----	91,891.41
20.	(a) Item 12, Departmental Income, exempt from taxation, and should not be included by Auditor in ascertaining Item 20, on Line 20, to be entered on line 1,-----	538,637.12
	(b) Total, Items 13, 14, 15 and 17, thus excluding Departmental income, which Taxpayer claims is exempt, and should be entered by Auditor in Item 20, or on line 20,-----	108,809.04
	(c) Items 13, 14, 15 and 17, thus excluding Departmental Income, which Taxpayer claims is exempt, together with Income not exempt, which should not be entered by Auditor in Item 20, on line 20,-----	647,446.16

GENERAL DEDUCTIONS.

21.	Returned in original return, but allowable, if Item 12 be taxed, and allowed by Auditor's Examiner, when considering original return, and Taxpayer's books,-----	103,367.19
23.	Returned in original return, but included with Federal taxes, now excluded, and allowed by Auditor's Examiner, when considering original return and Taxpayer's books,-----	15,537.15
24.	Included in original return, and allowed by Auditor's Examiner, when considering original return and taxpayer's books, and allowable in any event,-----	75,040.15

26. Included in original return, and allowed by Examiner, when considering original return and Taxpayer's books,----- 23,950.00
27. Included in original return, and allowed by Auditor's Examiner, when considering original return, and Taxpayer's books,----- 26,931.86
28. Total General Deductions, Items 23 and 24, allowable in any event, which should be entered by Auditor in Item 2, or on line 2,----- 90,579.30
- A. Item 20 (b), less Item 28, (showing no additional income to that shown by original return for 1918, unless Item 12, (Departmental), be included, which Taxpayer claims is exempt, and should be eliminated, and which should be entered on line 1, Printed Form, showing actual net income,----- 18,229.74
- B. Item A, less Item 9, on line 9, Printed Form, exemptions allowable, showing actual taxable income,----- 14,229.74
- C. Computation of tax on not taxable income (Item B), which should be entered by Auditor under that head, on page 1, as follows:
- | | | |
|---|-------------|---------|
| | AMOUNT. | TAX. |
| (a) On first \$10,000 3/4 of One percentum ,----- | \$10,000.00 | \$75.00 |
| (b) On next \$15,000 1/2 of One percentum,----- | 4,229.74 | 21.15 |
| Total tax to be paid,----- | | 96.15 |
- D. Total tax paid, as shown by original return and assessment for 1918, erroneously and wrongfully assessed and collected, and equitably creditable to Taxpayer,----- 1,482.89
- E. Excess paid by Taxpayer, as shown by original return, erroneously and wrongfully assessed and collected, and in equity and good conscience, creditable to and returnable to Taxpayer,----- 1,487.74

GENERAL DEDUCTIONS

NOTE:—Claims for deductions cannot be allowed unless the information required below is clearly set out.

21. The amount of necessary expenses actually paid within the calendar year, for which the return is made, in carrying on any individual business. (There must not be included under this head personal, living or family expenses, business expenses of partnership or cost of merchandise. Amounts paid for permanent improvement or betterment of property are not proper expense deductions. Donations not a proper deduction) Supplemental. See supplementary sheet preceding and following	103,367	19
22. All interest paid within the year on personal indebtedness of taxpayer Wife's deduction Children's deduction		
23. All State, county, school and municipal taxes paid within the year (not including those assessed against local benefits nor Federal income tax) Supplemental. See supplemental sheets preceding and following	15,539	15
24. Losses actually sustained during the year incurred in trade, or arising from fires or storms and not compensated by insurance or otherwise. Oil and mining leases are termed investments and not proper deductions if you still hold lease. Wife's deduction Supplemental. See sheets preceding and following Children's deduction NOTE:—State (a) of what the loss consisted; (b) when it was actually sustained; and (c) how it was determined to be a loss.	75,040	15
25. Debts due to the taxpayer actually ascertained to be worthless and charged off at the end of the year Wife's deduction Children's deduction NOTE:—State (a) of what the debt consisted; (b) when they were created; (c) when they became due, and (d) how they were actually determined to be worthless. (Give information on separate sheet.)		
26. Amount representing a reasonable allowance for exhaustion, wear and tear of property arising out of its use or employment in business . No deduction shall be made for any amount of expenses of restoring property, or making good the exhaustion thereof for which a deduction is claimed elsewhere in this return. Wear and tear, nor gasoline, nor upkeep on pleasure car not proper deduction Supplemental. See supplemental sheets preceding and following Wife's deduction following Children's deduction NOTE:—State (a) what the property was on which depreciation was taken, (if buildings, state when erected, of what material constructed, and value of same as of January 1st of the calendar year for which this return is rendered); (b) what per cent of depreciation is claimed.	23,950	00
27. Amount allowed to cover depletion, in case of mines and oil wells, not to exceed 5 per cent of the gross value at the mine or well of individual's interest in the output for the calendar year for which this return is rendered Supplemental. See supplemental sheets preceding and following Wife's deduction Children's deduction NOTE:—State (a) gross value at the mines or wells, of the output for the calendar year for which this return is rendered; (b) your interest in the output; and (c) what per cent depletion is claimed.	26,981	85
28. Total general deduction (to be entered on line 2) NOTE:—If space is insufficient for answering any question attach a supplemental sheet to this return.		

AFFIDAVIT TO BE EXECUTED BY INDIVIDUAL MAKING THIS RETURN

State of _____, ss. _____ County of _____,

being first duly sworn according to law, deposes and says.

That the foregoing return contains a full, true, correct and complete statement of all gains, profits and income received by _____ during the year for which the said return is made; that the said _____ is entitled to all the deductions and exemptions entered or claimed therein under the provisions of the income tax law. Further, affiant sayeth not.

Subscribed and sworn to before me this _____ day of _____, 19____

(Seal)

Official Capacity.

INSTRUCTIONS

1. This return shall be made by each and every person in the State having a net income of \$3,000 or over, for the taxable year.
2. This return shall be made by each and every person residing outside of State deriving a net income from property owned and business, trade or profession carried on in this State, of \$3,000 or over, for the taxable year.
3. This return shall be filed with the State Auditor on or before the first day of March of each year.
4. This return shall show the net income of the taxpayer for the calendar year ending December 31st, last preceding; and shall be sworn to by taxpayer. Affidavit may be made before any officer authorized by law to administer oaths.
5. An unmarried individual or married individual not living with husband or wife, shall be allowed an exemption of \$3,000. Where husband and wife live together they shall be allowed jointly a total exemption of only \$4,000. In addition to the foregoing, an exemption of \$300 shall be allowed at line 6 for each child under the age of eighteen, and if such child is engaged in acquiring an education, an additional deduction of \$500 shall be allowed at line 7. For each child over the age of eighteen, engaged in acquiring an education, an additional deduction of \$500 at line 7. For each person (other than mentioned above) for whose support the taxpayer is legally liable and who is actually and solely supported by and totally dependent upon and actually and permanently domiciled with the taxpayer an additional \$500 while such dependent is engaged solely in acquiring an education, and \$200 in other cases.
6. When an individual by reason of minority, or other disability, is unable to make his own return, it may be made for him by his duly authorized representative.
7. Amounts charged on line 21 for restoring property or making good the exhaustion thereof from its use in business, together with the amount claimed for depreciation on line 26 must not exceed the deterioration of the property in one year.
8. On line just under your name address on first sheet, give name of county in which principal property is located from which income is reported.
9. Taxes under this return are due and payable upon the 15th day of June and become delinquent if not paid on or before the 1st day of July next following.
10. If the taxes under this return are not paid on or before July 1st, a warrant will be issued to the sheriff of the proper county for collection.
11. Taxes delinquent under this return are a lien upon all the property of the taxpayer both real and personal, and subject to the same penalties and provisions as ad valorem tax.
12. The law provides that all revisions and corrections of reports filed must be made before the first Monday in June following the filing of such reports, hence all requests for revision or correction must be filed in this office before said first Monday in June, and no request for correction or revision will be entertained by this office after said date.

80 *Supplemental Sheets, Space Being Insufficient in Printed Form.*

Your Taxpayer herein and hereby claims, alleges and shows that his income hereinbefore supplementarily set forth, and particularly that part as shown in and by Item 12, of this Supplemental Return, in the sum of Five Hundred and Thirty Eight Thousand Six Hundred and Thirty-seven Dollars and Twelve Cents (\$538,637.12), is exempt from taxation by the State of Oklahoma; that said amount was erroneously and without obligation, included and returned in Item 12 of his original return, for the year 1918, and was erroneously and wrongfully assessed and taxed by the State of Oklahoma for that year, and that said amount cannot now, or at any time, be rightfully and legally assessed and taxed by and with any additional tax whatsoever; that said State has no power, right or authority, under and by virtue of the Statutes in that behalf provided, to impose, such tax upon such income, to assess, levy and collect any income tax whatsoever upon said income, and that such Statutes imposing, or purporting, pretending or attempting to impose, such tax upon such income, are null, void and of no force and effect, and are unconstitutional, and in violation and contravention of the Constitution, Laws, Treaties, and Agreements of the United States of America, and of the Constitution of the State of Oklahoma, and said Auditor is wholly without power, right or authority to review and revise the return heretofore made by your Taxpayer, and accepted by said Auditor, and to revise the assessment heretofore made, and to collect any further, other or additional tax or taxes, or penalties, or both, from your Taxpayer for the year 1918, and, as grounds and reasons therefor, avers, alleges and shows as follows:

That your Taxpayer is the owner, or part owner of, or the lessee or co-lessee in, and all the income hereinbefore set forth and claimed to be exempt from taxation by the State of Oklahoma, is derived solely from, the following oil and gas mining leases, or oil mining leases, which leases, and each of them, were subject to the approval of, and have been approved by, the Secretary of the Interior, on and covering restricted Indian lands, respectively, hereinafter described:

1. An oil and gas mining lease, dated March 3rd, 1912, approved by the Department of the Interior, or Secretary thereof, on December 13th, 1912, on and covering the South Half ($\frac{1}{2}$) of the North Half ($\frac{1}{2}$) of the southeast Quarter ($\frac{1}{4}$) and the South Half ($\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$), Section Five (5), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian,

81 lying, being and situate in Creek County, Oklahoma, being restricted Indian lands, made and executed by Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, under authority of the Act of Congress, and the Treaties and agreements with said Indians, and under the Rules and Regulations of the Department of the Interior of the United States, with the approval of the Secretary of the Interior, to Mannford Oil & Gas Company, and thereafter assigned by said Company, under authority of the same

Acts, Treaties, Agreements, and Rules and Regulations, with the approval of said Secretary of the Interior, to your Taxpayer and the Gypsy Oil Company, each owning an undivided one-half thereof, and at all times operating said lease under and in accordance with said rules and regulations in that behalf provided.

2. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13th, 1916, on and covering the northeast Quarter (Lot 107), Section Eight, Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

3. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its principal chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section Three of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter, Section Five (5), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

4. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under Authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter (Lot 94), Section Three (3), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

5. An Oil Mining Lease, dated the 28th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter (Lot 102), Section Thirty (30), Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

6. An Oil Mining Lease, dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief,

under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter (Lot 103) Section Thirty-two (32), township twenty-one (21) North, Range Twelve (12) east of the Indian meridian, lying, being, and situate in Osage County, Oklahoma.

7. An Oil Mining lease dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its Principal Chief under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, parties of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter (Lot 104), Section Thirty-one (31), township twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being, and situate in Osage County, Oklahoma.

8. An Oil Mining Lease dated the 29th day of May, A. D., 1916, by and between the Osage Tribe of Indians, by its principal chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes an undivided one-fourth interest, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter (Lot 104), Section Thirty-two (32), Township Twenty-
 83 one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

9. An Oil Mining Lease, dated the 4th day of July, A. D., 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, party of the second part, and in pursuance of Section 3 of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the southeast quarter of Section thirty-two (32), township twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being, and situate in Osage County, Oklahoma.

10. An Oil Mining Lease, dated the 21st day of November, A. D., 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an un-

divided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southeast Quarter of Section Six (6), Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

11. An Oil Mining lease, dated the 21st day of November, A. D. 1917, by and between the Osage Tribe of Indians, by its Principal chief, under authority of the Resolution of the Osage Tribal Council, dated June 17, 1915, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Southwest Quarter of Section Thirty-one, Township Twenty-one (21) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

12. An Oil Mining Lease, dated the 21st day of November, A. D. 1917, by and between the Osage Tribe of Indians, by its Principal Chief, under authority of the resolution of the Osage Tribal Council, dated June 17, 1915, party of the first part, and F. A. Gillespie, an undivided three-fourths interest, and Charles W. Grimes, an undivided one-fourth interest, parties of the second part, and in pursuance of the Act of Congress approved June 28, 1906, and approved by the Secretary of the Interior June 13, 1916, on and covering the Northeast Quarter of Section Six (6) Township Twenty (20) North, Range Twelve (12) East of the Indian Meridian, lying, being and situate in Osage County, Oklahoma.

That said lease, mentioned in Paragraph 1, preceding, is on and covers restricted Indian lands, which are owned by said Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, and said Indians maintain tribal relations, and are wards of the Government of the United States, and said Jackson Barnett is a ward of said Government, and his said lands are restricted lands under the laws of the United States, and, in operating the said lands for oil and gas, your Taxpayer and his co-lessee are doing so under a lease made by an Indian citizen of the Creek Nation or Tribe of Indians, in accordance with the Rules and Regulations of the Department of the Interior, and the provisions of the various Indian Treaties and Agreements with said Indians, and the Acts of Congress, and under a lease which has been duly and regularly approved by the Department of the Interior, or the Secretary thereof, and are acting as the agent of the Government of the United States, and as the agent of said Indian and ward of said Government, in producing said oil and gas from said restricted Indian lands; that said lands described in and covered by said lease are owned by said Indian citizen, who is a ward of the Government of the United States, and it was, and is, and will be, the duty of said Government of the United States to operate and develop said lands, or to provide for the operation and development thereof, for the production of oil and gas therefrom for the

benefit of its ward, and to see that the oil and gas therefrom *is* not wasted and destroyed, and your taxpayer and his co-owner or co-lessee are operating said lands, and producing oil and gas therefrom, under and in accordance with the provisions of said lease, the Treaties and Agreements with said Indians, and the various Acts of Congress relating thereto, and pay a royalty provided for in and by said lease to the Indian Agent or Superintendent in charge of said Nation or Tribe of Indians, and of the citizens and members thereof, the Representative and Agent of said Department of the Interior, or the Secretary thereof, and of the citizens and members of said Nation or Tribe of Indians, and the royalty, when so paid to said Agent or Superintendent, is by him held under and in accordance with said Rules and Regulations prescribed and promulgated by said Secretary of the Interior, and the various Acts of Congress in regard thereto, and paid out to such Indian in such sums and by such methods as the Secretary of the Interior may order and direct, and in accordance with said Rules and Regulations governing and controlling the same, and the provisions of the various Acts of Congress of the United States with reference to the same.

That, under the Treaties and Agreements of the United States with said Creek Nation or Tribe of Indians, and under the Act of Congress of May 27, 1906, said Indian Owner of said lands set out and described in said lease, has no right or authority to make oil and gas mining leases covering his said lands, except as provided in said Treaties and Agreements and Acts of Congress, and said Rules and Regulations of the Department of the Interior, or of the Secretary thereof, governing and controlling the same; that said Indian Owner is a ward of the said United States as to his said restricted lands, and that said lands must be operated and developed for oil, gas and other minerals purposes, and in accordance with said Treaties and Agreements, said Acts of Congress and said Rules and Regulations, and not otherwise.

That said leases, mentioned in Paragraphs 2 to 12 hereof, inclusive, preceding, are on and cover lands on what is now known as Osage County, Oklahoma, but which was formerly known as and was Osage Reservation, an Indian Reservation; that for a long time prior to June 28, 1906, said Osage County, Oklahoma, was said Indian Reservation, and had been granted by the United States of America to the Osage Tribe or Nation of Indians as a Reservation for the use and benefit of such Tribe or Nation under the Constitution and Laws of said United States, and in pursuance of Treaties and Agreements made between it and said Tribe or Nation of Indians, and all lands now embraced in said Osage County had been patented to said Tribe or Nation of Indians, and set apart as an Indian Reservation for the sole and exclusive use and occupancy of said Tribe or Nation of Indians, and the members and citizens thereof, and by them held in common.

That, on said June 28, 1906, the Congress of the United States passed an Act providing for the allotment of the lands of said Indian Reservation to the individual members of said Tribe or Nation, which Act, among other things, provided that nothing therein contained

should authorize the sale of oil, gas, coal or other minerals covered by said lands, reserving to the use of said Tribe or Nation for a period of twenty-five years all such oil, gas and other minerals, the royalty to be paid said Tribe or Nation, as in said Act provided, and providing that the oil, gas, coal and other minerals in and upon said lands should become the individual property of said individual owners at the expiration of said period of twenty-five years, unless otherwise provided by Congress; that said Act further provides that all oil, gas, coal and other minerals covered by said lands should be reserved to said Tribe or Nation of Osage Indians for a period of
25 twenty-five years from and after the 8th day of April, 1916,
86 and all leases for oil, gas, coal and other minerals covered by selections, divisions and allotment of said lands, provided for in and by said Act, might and should be made by said Osage Tribe of Indians through its Tribal Council, and with the approval of the Secretary of the Interior, and under such Rules and Regulations as he should prescribe, and said Osage leases, hereinbefore mentioned and referred to, have been so made; that the royalties to be paid to said Tribe or Nation for any such oil, gas and other mineral leases should be determined by the President of the United States, and providing that no mining or prospecting should be permitted on the homestead selections provided for in said Act, without the written consent of the Secretary of the Interior, and that all funds belonging to the said Osage Tribe or Nation, and all moneys due, and all moneys that might become due, or that might hereafter be found to be due to the Osage Tribe or Nation of Indians, should be held in trust by the United States for the benefit of said Tribe or Nation for a period of twenty-five years from and after the 1st day of January, 1907, except as otherwise in said Act provided, and further providing that all moneys received as royalties from oil, gas and other minerals produced from the lands of said Osage Tribe or Nation should be placed in the Treasury of the United States to the credit of the Osage Tribe or Nation of Indians, and that the same should be paid out and distributed to the individual members of said Tribe or Nation, in accordance with and in the manner prescribed in said Act.

That said Osage Tribe or Nation of Indians is now, and was at the time of the execution of each and all of said oil mining leases, the ward of the United States of America, and the members and citizens thereof wards of said United States as to their restricted property and rights, and, under the control, direction and supervision of the Department of the Interior, and the Secretary thereof, and under the direct control and management of the Indian Superintendent or Agent of said Indians, who had, and has, general control, supervision and management of all the business or affairs of said Tribe or Nation, and the individual members thereof, and of the operations on said lands of said Tribe or Nation, and of the lands of the individual members and citizens thereof, for all oil, gas and mineral purposes, and all said operations have been, are now, and will be conducted under his supervision and control, and that of the Department of the Interior, and the Secretary thereof, and all moneys, funds and royalties belonging to said Tribe or Nation, or which may

hereafter belong to or become due to said Osage Tribe or Nation, were, have been, are and will be, under the control and management of the United States, and were, have been, are, and will be, 87 paid into the Treasury of the United States to be paid out in the manner prescribed by law, and in accordance with the rules and regulations prescribed, and to be prescribed, by the Secretary of the Interior, and such Rules and Regulations, at all the times herein mentioned, have been, and are, now, in full force and effect; that the United States, being the ultimate owner of the fee of the land embraced in said Osage Reservation, holding the same in trust for the use and benefit of said Indians, as Trustee for them, it became, was, is and will be, the duty of said United States to develop, or to see that the lands belonging to said Nation or Tribe of Indians, and being a part of said Reservation, were, are, and will be developed for oil and gas mining purposes, and that the interest of said Tribe or Nation, and the members and citizens thereof, in and to the oil, gas and other minerals underlying the lands of their said Reservation, and any royalty to be produced therefrom, should be protected, subserved, and prevented from going to waste, and that the proceeds thereof should be properly applied to the maintenance, care and support of said Indians, and, under the laws of the United States, the funds and royalties of said Indians are to be paid into the Treasury of the United States, and are to be used and expended for the purposes above named, under the supervision and control of the United States and its duly appointed Representatives and Agents.

That all the above oil mining leases have been duly approved by the Secretary of the Interior, under and by virtue and in pursuance of said Acts of Congress, and the Rules and Regulations prescribed and promulgated by the Secretary of the Interior, and said leases and the lands covered by them, are being operated by your Taxpayer, or by him and his co-owners or co-lessees, and the oil produced therefrom under said Laws, Treaties and Agreements, and Rules and Regulations.

That, under the Constitution and Laws of the United States, the Indian Nations or Tribes inhabiting the State of Oklahoma, and the individual members thereof, and the lands and property of said Indians, are under the sole and exclusive jurisdiction of the United States of America, except so far as such jurisdiction may be surrendered to the State of Oklahoma, and that, as to said Indian Owner of the lands described in said lease, mentioned in paragraph 1 hereof, and as to the said Tribe or Nation of Osage Indians, and the lands described in said leases covering their lands or selections or allotments, the said United States, as to their jurisdiction, have not surrendered their jurisdiction thereof and thereover to the State of Oklahoma.

88 That, under and by virtue of the Act of Congress of June 16th, 1906, being an Act, among other things, to enable the people of Oklahoma Territory and of the Indian Territory to form a Constitution and State Government, and to be admitted into

the Union on equal footing with the original States, by Section 3 thereof, it was expressly provided that the people of said proposed State of Oklahoma should forever disclaim all right and title to all lands lying within the limits of said State, owned or held by any Indian Nation or Tribe, and that the same should remain subject to the jurisdiction, disposal and control of the United States, and the Constitution of the State of Oklahoma, in Section 3 of Article 1, expressly disclaims any right or title to lands belonging to any Indian Nation or Tribe, and provides that the same shall remain subject to the jurisdiction, disposal and control of said United States, and, by reason of all the premises, all the lands hereinbefore described in and covered by said leases, at all times have been, and are now subject to the jurisdiction, disposal and control of said United States.

That, under the Constitution and Laws of the United States, Indians maintaining tribal relations, and individual Indians, under the jurisdiction and control of the United States, and of the United States Indian Agents or Superintendents, or other representatives of the United States, are, as to their restricted lands and property rights, wards of said United States, and under its control and jurisdiction, and the State of Oklahoma has no power, right or authority to pass any laws affecting the property rights of any of said Indians as to their restricted lands and property rights, and said Jackson Barnett, the Indian Owner of the lands described in said lease mentioned in paragraph 1 hereof, is an Indian maintaining tribal relations, and said Osage Tribe or Nation of Indians, and the individual members thereof, are a Tribe or Nation of Indians maintaining tribal relations, and said Indian, said Tribe or Nation, and the individual members thereof, are under the jurisdiction and control of said Government of the United States, and of said Indian Agents or Superintendents or Representatives of said United States; that said Indian, Jackson Barnett, is of the degree of blood mentioned in said Act of May 27th, 1908, which makes his lands restricted Indian lands, and said Act of June 28, 1906, makes the lands of the Osage Tribe or Nation of Indians, and of the individual members thereof, restricted Indian lands; that all of said lands set forth and described in said leases are restricted Indian lands, under and by virtue of the various Indian Treaties and Agreements with said Indians, and said Act of May 27, 1908, and said Act of June 28,

1906 and other Acts of Congress relating thereto, and that no law enacted and passed by the State of Oklahoma imposing a tax upon said lands, or the oil and gas mining leases thereon, or both, directly or indirectly taxing either or both, or upon the use or occupancy of said lands, or any part thereof, or on the oil and gas produced therefrom, or the income derived from said oil and gas or from said leases or lands, or any part thereof, can subject the same to such tax or taxation, and the same, including such income, are, and cannot be made, subject to any tax, direct or indirect, assessed or levied, or attempted to be assessed or levied, thereon by any law of the State of Oklahoma, or by the Auditor, or any officer, agent or representative of the State of Oklahoma, acting, purporting or attempting, to act, under and by authority of any law of the State

of Oklahoma, and that any law of the State of Oklahoma, levying, assessing, or authorizing the assessment or levy of, or purporting, pretending, or attempting to assess or levy, or to authorize the assessment or levy of, any tax directly or indirectly, upon such property, or upon its use and occupancy, or the income therefrom, is opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution of the State of Oklahoma.

That your taxpayer, as the part owner of, or co-lessee in, said leases, together with said leases, then and there became, at all times has been, and is now, and will in the future be, the agent or instrumentality of said Government of the United States, and the agent or instrumentality of said Tribe or Nation of Osage Indians, and the members and citizens thereof, and of said Indian citizen, and a means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and your Taxpayer then and there became, at all times herein mentioned has been, is now, and will in the future be, engaged in the occupation as and of such agent of said Government, and of said Indian wards of said Government, and there was then and there granted to your Taxpayer, and your Taxpayer has since been, and is now exercising, and in the future will exercise, privileges, licenses, and franchises to him so granted by said United States, as such agent, instrumentality or means.

That any tax imposed upon the income derived from said leases upon restricted Indian Lands of said citizen or member of said Creek Nation or Tribe, and of said Osage Nation or Tribe of Indians, and the members and citizens thereof, and upon the income herein claimed to be exempt, would be and is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and would be and is a tax upon an agency of the United States, and would be and is a tax upon a privilege or occupation upon and exacted from an instrumentality of the United States, and would be and is a tax upon a license or franchise granted by said United States, and exercised by your Taxpayer under and by virtue of the Constitution and Laws of said United States, and would be and is a tax upon an agent of the United States Government and his occupation as such, and would be and is a tax upon the income from property, when the property itself is exempt, by reason of the Constitution and Laws of the United States, from taxation by the State of Oklahoma, and would be and is a tax, substantially and in effect, upon the lease and property, from which said income is derived, the same being exempt from taxation by the State of Oklahoma, and would be and is a tax indirectly imposed by the State of Oklahoma, when it cannot directly impose such a tax, and would be and is a tax upon the powers and operations of the Government of the United States, and would be and is a tax upon property of the United States, or property held in trust by it for its said Indian wards, and Statutes and Laws of the State of Oklahoma, and particularly the Act of the Legislature, approved March 17, 1915, chap. 164 Session

Laws, 1915, beginning on page 232, and the Act of the Legislature, approved March 2, 1917, Chapter 265, Session Laws, 1917, beginning on page 486, and all Acts amendatory thereof and thereto, assessing or levying, or authorizing the assessment or levy of, or purporting, pretending or attempting to assess or levy, or authorize the assessment or levy of, any such tax upon the aforesaid income, herein and hereby claimed to be exempt from such taxation by the State of Oklahoma, are opposed to, and in violation and contravention of, the Constitution and Laws of the United States, and the Treaties and Agreements by it made with said Indians, and of the Constitution of the State of Oklahoma, and are void, null, and of no force and effect whatsoever, and, by reason of all the premises, said State of Oklahoma, and the Auditor of said State, and any officer, agent or representative of said State, are wholly without right, power or authority to assess, levy, and collect any income tax or tax whatsoever upon said income, and said income is absolutely exempt from such and all taxation.

That, unless said income derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, shall be included as part of the income of your Taxpayer, taxable by the State of Oklahoma, no other, further or additional taxes are, or can be, made to appear as now, or ever having been, assessable, or rightfully to be levied, on said income for 91 the year 1918, or due, or to become due, from your Taxpayer, and, by reason of all the premises, said income aforesaid, and herein and hereby claimed to be exempt from taxation by the State of Oklahoma, and said State, and its Auditor, are wholly without power, right or authority to include said income in and as a part of the taxable income of your Taxpayer, who has already paid all, and more than, he should have paid on his income for said year of 1918.

That said Auditor did not revise said original return made to him by your Taxpayer for the year 1918, and notify your Taxpayer of any such revision on or before the first Monday in May following, to-wit, the first Monday in May, 1919, but said Auditor completed the assessment of income returned by your Taxpayer for the year 1918, and computed the tax thereon on or before the first Monday in June 1919, and your Taxpayer paid the tax assessed and computed thereon by said Auditor, and, by reason of all the premises, and State of Oklahoma, and said Auditor thereof, and each and both of them, are without right, power or authority to now, or hereafter, revise said original return, and to make any assessment upon such revised return, and to assess, levy and collect any additional tax or taxes upon the income of your taxpayer for the year 1918.

Wherefore, and by reason of all the *pemirese*, your Taxpayer, claims his said income as shown by this supplemental return, derived from and by reason of said leases on said restricted Indian lands, and from the oil and gas thereon and thereby produced, is exempt and free from taxation by the State of Oklahoma, and that the state of Oklahoma, and its said Auditor acting for it, are wholly without

right, power or authority at this time, and in this proceeding, to revise his said original return for the year 1918, and to assess, levy and collect any additional tax, or penalties, or both, upon the income of your Taxpayer for the year 1918.

F. A. GILLESPIE,
By PEARL KIMBLE,
His Agent.

92 STATE OF OKLAHOMA,
County of Tulsa, ss:

Pearl Kimble, being first duly sworn according to law, deposes and says: That she is the agent of said F. A. Gillespie, and, as such is authorized to and makes, this affidavit, for him and in his behalf; that, at all the times mentioned in the foregoing return she kept his books, and is personally acquainted with the facts, figures, matters and things therein set forth, and that said F. A. Gillespie is now, and for some time will be, absent from the County of Tulsa, and State of Oklahoma; that the foregoing Supplemental Return contains a full, true and correct and complete statement of all the gains, profits and income received by said F. A. Gillespie during the year for which said Supplemental Return is made, and of the income which said F. A. Gillespie claims is exempt and free from taxation by the State of Oklahoma, and the reasons and grounds therefor, and that said F. A. Gillespie, is entitled to all the exemptions entered or claimed therein under the provisions of Chapter 164, Session Laws of 1915, the same being an Act providing for an income tax. Further affiant sayeth not.

PEARL KIMBLE.

Subscribed and sworn to before me, this 30th day of January, A. D., 1920.

My commission expires April 19, 1921.

N. C. CROSS,
Notary Public.

[SEAL.]

93 And thereafterward, to-wit, on said same day, the parties to said matters, proceedings or causes, filed before and with said Auditor, their stipulation for the consolidation of said matters, proceedings and causes, and said Auditor made and entered his order consolidating the same, upon and in accordance with said stipulation and agreement, which said stipulation and agreement and said order of consolidation are in words and figures following:

STATE OF OKLAHOMA,

County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of the Income Tax Return and Assessment of F. A. Gillespie for the Year 1915.

In the Matter of the Income Tax Return and Assessment of F. A. Gillespie for the Year 1916.

In the Matter of the Income Tax Return and Assessment of F. A. Gillespie for the Year 1917.

In the Matter of the Income Tax Return and Assessment of F. A. Gillespie for the Year 1918.

Stipulation for Consolidation.

Inasmuch as each and all of the above matters, proceedings or causes, pending before said Auditor of the State of Oklahoma, present and involve like questions of fact, and present and involve identically the same questions of law, it is hereby stipulated and agreed by and between the parties hereto that each and all of said matters, proceedings or causes shall and will be consolidated into one sole and single matter, cause or proceeding, and be tried, heard and determined in said consolidated matter, cause or proceeding, at the same time and place, and together and shall hereafter, before and
94 by said Auditor, and before and by any Court or Courts to which the same may be appealed, or by any manner come or be brought before said Court or Courts, for trial, hearing and determination, proceed, be tried and determined, and all steps taken therein in said consolidated matter, proceeding, or cause, in and as one sole and single matter, proceeding or cause.

S. P. FREELING,

Attorney General.

By W. R. BLEAKMORE,

Assistant Attorney General,

For the State of Oklahoma, Plaintiff Therein.

JAMES P. GILMORE,

Attorney for F. A. Gillespie, Defendant Therein.

Now on this the 6th day of February, A. D., 1920, upon, and in accordance with, and agreeable to, the above and foregoing stipulation of the parties hereto, and to each and all of said matters, pro-

ceedings or causes, it is hereby ordered and adjudged by the Auditor of the State of Oklahoma, that each and all of the above entitled matters, proceedings or causes be, and the same are hereby, consolidated into one sole and single matter, cause or proceeding, and shall be tried, heard and determined in said consolidated matter, cause or proceeding, at the same time and place, and together, and shall hereafter, before and by the Auditor, and before and by any Court or Courts, to which the same may be appealed, or by any manner come or be brought before said Court or Courts for trial, hearing and determination, proceed, be tried, heard and determined, and all steps therein taken in said consolidated matter, proceeding or cause in and as one sole and single matter, proceeding or cause.

FRANK C. CARTER,
Auditor of the State of Oklahoma.

And thereafterward, to-wit, on said same day, a hearing and trial was had before and by said Auditor, upon each and all of said Supplemental Returns, and after said trial and hearing was completed, said Auditor made and entered his orders, judgments, decrees, rulings and actions thereon, which are in words and figures following:

STATE OF OKLAHOMA,
County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

95 THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant..

In the Matter of Income Returns and Assessments of F. A. Gillespie for the Years 1915, 1916, 1917, and 1918.

Consolidated.

Now on this the 6th day of February, A. D., 1920, the State of Oklahoma appearing by W. R. Bleakmore, the Assistant Attorney General of said State, and the Representative of S. P. Freeling, the Attorney General of said State, and said F. A. Gillespie appearing by James P. Gilmore, his attorney, and waiving any and all notice of this hearing, and the parties hereto agreeing and consenting that the same may be heard at this time and place, and the hearing or hearings of the Supplemental Returns of said F. A. Gillespie for the years 1915, 1916, 1917 and 1918, respectively, coming on regularly to be heard, and in accordance with said agreement and waiver in the above entitled consolidated matter, cause or proceeding, and it appearing to the Auditor and the Auditor so finding, that said F. A. Gillespie filed heretofore his returns of net annual income for said years of 1915, 1916, 1917 and 1918, respectively, and paid the taxes

assessed and levied and computed thereon, for each of said years, respectively, but said Auditor believing and claiming that said F. A. Gillespie has not returned and paid upon as much income as he should have returned and paid upon for each of said years, respectively, and it further appearing to the Auditor, and the Auditor so finding, that said F. A. Gillespie, claiming and alleging that he has returned and paid upon all the net income which the State of Oklahoma was and is entitled to impose, assess, levy and collect an income tax upon for said years, respectively, and that his income upon which the said State of Oklahoma now seeks to impose, assess, levy and collect additional taxes for each of said years respectively, is exempt from taxation by the State of Oklahoma, and it further appearing to the Auditor and the Auditor so finding, that said F. A. Gillespie, making his said claims of exemption, and without waiving any of his rights with reference thereto, after the examination of his accounts and books by said Auditor for each of said years, respectively, and in response to the demand of said Auditor for said information, has filed his Supplemental Returns for each of said years, respectively, and the Auditor having seen, read and heard said Supplemental Returns, and each and all of them, and being fully advised in the premises finds, orders, adjudges and decrees as follows:

1. That each and all of said Supplemental Returns for said years 1915, 1916, 1917 and 1918, correctly sets forth the items of income of said F. A. Gillespie therefor, and the deductions to which he is entitled for each of said years respectively, and correctly sets forth the income in and for each of said years for which exemption from taxation by the State of Oklahoma is claimed, and that in each and all of said Supplemental Returns, Item 12 thereof, or the amount shown on Line 12 thereof, for each of said years, respectively, is derived solely from the leases described in said Supplemental Returns, on Restricted Indian Lands, as claimed in and by said Supplemental Returns, made and executed in pursuance of the Acts of Congress and Treaties and Agreements with the Indians, and the Rules and Regulations prescribed and promulgated by the Department of the Interior, and operated under the said leases, and the Rules and Regulations and supervision of the Department of the Interior, or the Secretary thereof, as claimed in and by said Supplemental Returns.

2. That for the year 1915, said F. A. Gillespie, in his return of annual net income, returned a gross income of \$45,487.59, and claimed and took general deductions in the sum of \$11,575.07, and was entitled to exemptions in the sum of \$4,300.00, levying upon the basis of said original return, a taxable net income of \$29,612.52, with which he was assessed, and the tax correctly computed thereon amounted to \$538.36, which was by him paid within the time required by law, and, unless said Item 12 of his said Supplemental Return be added to, and included in, his said income, he has paid all the taxes that can be assessed, levied and collected upon his said income.

That, in and by said Supplemental Return for said year, said F. A. Gillespie shows in Item 12 thereof, or on line 12 thereof, the sum of \$131,866.97, which the Auditor finds was and is derived solely from the Oil and Gas Mining Lease on restricted Indian Lands, as therein and thereby claimed, which said taxpayer claims is exempt from taxation by the State of Oklahoma; that the Auditor hereby denies and overrules the claim that said income is exempt from taxation by the State of Oklahoma, and holds said income subject to taxation by the State of Oklahoma.

It is, therefore, by the Auditor ordered, adjudged and decreed that said F. A. Gillespie be, and is hereby, assessed with said additional sum of \$131,866.97, making his aggregate assessments of gross income for said year \$175,705.19, and that he be, and is hereby, allowed general deductions in the sum of \$76,703.19, and exemptions in the sum of \$4,300.00, making his taxable income for the year 1915 \$94,702.00, and the tax computed thereon amounts to the sum of \$2,938.08, which, credited by the amount heretofore paid by him, leaves due thereon the sum of \$2,399.72, and that there have accrued thereon, and there are assessed and levied against the same, the sum of \$1,907.74 as penalties.

It is, therefore, by the Auditor further ordered, adjudged and decreed that the income of said F. A. Gillespie for the year 1915, and said F. A. Gillespie, be and are hereby assessed with, and there is levied thereon and against the same, additional taxes in the sum of \$2,399.72, and penalties in the sum of \$1,907.74, aggregating the sum of \$4,307.46, and that said F. A. Gillespie be, and he is hereby, ordered to pay said taxes and penalties immediately, and, in default of said payment, that warrant issue therefor, as by law provided, and that said State of Oklahoma have execution of said warrant.

To which order, judgment or decree, and actions and rulings of the Auditor, said F. A. Gillespie then and there excepted and still excepts.

3. That for the year 1916, said F. A. Gillespie, in his original return of net annual income, returned a gross income of \$127,310.62, and claimed and took general deductions in the sum of \$76,787.05, and was entitled to exemption in the sum of \$4,300.00 leaving, upon the basis of said original return, a taxable net income of \$46,223.57, with which he was assessed, and the taxes correctly computed thereon amounted to \$1,056.71, which was by him paid within the time required by law, and, unless said Item 12 of his said Supplemental Return be added thereto, and included in, his said income, he has paid all the taxes that can be assessed, levied and collected upon his said income.

That, in and by said Supplemental Return for said year, said F. A. Gillespie shows in Item 12 thereof, or on Line 12 thereof, the sum of \$293,720.64, which the Auditor finds was and is derived solely from the oil and gas mining leases on restricted Indian lands,

as therein and thereby claimed, which said Taxpayer claims is exempt from taxation by the State of Oklahoma; that the Auditor denies and overrules the claim that said income is exempt from taxation by the State of Oklahoma, and holds said income subject to taxation by the State of Oklahoma.

98 It is, therefore, by the Auditor ordered, adjudged and decreed that said F. A. Gillespie be, and is hereby, assessed with said additional sum of \$293,720.64, making his aggregate assessment for said year \$421,030.26, and that he be, and is hereby, allowed general deductions in the sum of \$257,690.86, and exemptions in the sum of \$4,300.00, making his taxable income for the year 1916 \$159,039.40, and the tax computed thereon amounts to \$6,101.97, which, credited by the amount heretofore paid by him, leaves due thereon, the sum of \$5,065.26, and that there have accrued thereon, and there are assessed and levied against the same, the sum of \$3,115.13 as penalties.

It is, therefore, by the Auditor further ordered, adjudged and decreed that the income of said F. A. Gillespie for the year 1916, and said F. A. Gillespie, be and are hereby assessed with, and there is levied thereon and against the same, additional taxes in the sum of \$5,065.26, and penalties in the sum of \$3,115.13, aggregating the sum of \$8,180.39, and that said F. A. Gillespie be, and is hereby, ordered to pay said additional taxes and penalties immediately, and, in default of said payment, that warrant issue therefor, as by law provided, and that said State of Oklahoma have execution of said warrant.

To which order, judgment or decree, and actions and rulings of the Auditor, said F. A. Gillespie then and there excepted, and still excepts.

4. That for the year 1917, said F. A. Gillespie, in his original return of net annual income, returned a gross income of \$1,447,755.13, including therein \$1,307,979.39, which he claims as exempt from taxation, and which he was not required to return and pay taxes on, and claimed and took general deductions in the sum of \$1,145,363.35, and was entitled to exemptions in the sum of \$4,000.00, leaving, upon the basis of said original return, a taxable net income of \$298,391.78, with which he was assessed, and the taxes correctly computed thereon amounted to \$5,767.84, which was by him paid within the time required by law, and, unless said Item 12 of his said Supplemental Return be included in his said income, he has paid all the taxes that can be assessed, levied and collected upon his said income.

That, in and by said Supplemental Return for said year, said F. A. Gillespie shows in Item 12 thereof, or on Line 12 thereof, the sum of \$1,307,979.39, which said Auditor finds was and is derived solely from the oil and gas mining leases on restricted Indian lands, as therein and thereby claimed, which said Taxpayer claims is exempt from taxation by the State of Oklahoma;

99 that the Auditor denies and overrules the claim that said income is exempt from taxation by the State of Oklahoma,

and holds said income subject to taxation by the State of Oklahoma.

It is, therefore, by the Auditor ordered, adjudged and decreed that said F. A. Gillespie be, and is hereby, assessed with said sum of \$1,307,979.39, and the Auditor refuses to exclude the same from his said income, but includes the same, making his aggregate assessment for said year, \$1,447,755.13, and that he be, and is hereby, allowed general deductions in the sum of \$486,822.61, and exemptions in the sum of \$4,000.00, making his taxable income for the year 1917 \$933,932.82, and the tax computed thereon amounts to \$18,938.65, which, credited by the amount heretofore paid by him, leaves due thereon, the sum of \$13,170.81, and that there have accrued thereon, and there are assessed and levied against the same, the sum of \$3,358.55, as penalties.

It is, therefore, by the Auditor further ordered, adjudged and decreed that the income of said F. A. Gillespie for the year 1917, and said F. A. Gillespie, be and are hereby assessed with, and there is levied thereon and against the same, additional taxes in the sum of \$13,170.81, and penalties in the sum of \$3,358.55, aggregating the sum of \$16,829.36, and that said F. A. Gillespie be, and is hereby, ordered to pay said additional taxes and penalties immediately, and, in default of said payment, that warrant issue therefor, as by law provided, and that said State of Oklahoma have execution of said warrant.

To which order, judgment or decree, and actions and rulings of the Auditor, said F. A. Gillespie then and there excepted, and still excepts.

5. That for the year 1918, said F. A. Gillespie, in his original return of net annual income, returned a gross income of \$647,448.16, including therein \$535,637.12, which he claims as exempt from taxation, and which he was not required to return and pay taxes thereon, and claimed and took general deductions in the sum of \$559,301.39, and was entitled to exemptions in the sum of \$4,000.00, leaving, upon the basis of the original return, a taxable net income of \$84,144.77; with which he was assessed, and the taxes correctly computed thereon amounted to \$1,482.89, which was by him paid within the time required by law, and, unless said Item 12 of his said Supplemental Return be included in his said income, he has paid all the taxes that can be assessed, levied and collected upon his said income.

That, in and by said Supplemental return for said year, said F. A. Gillespie shows in Item 12 thereof, the sum of \$538,637.12, which said Auditor finds was and is derived solely from the oil and gas mining leases on restricted Indian lands as therein and thereby claimed, which said Taxpayer claims is exempt from taxation; that the Auditor denies and overrules the claim that said income is exempt from taxation by the State of Oklahoma, and holds said income subject to taxation by the State of Oklahoma.

It is, therefore, by the Auditor ordered, adjudged and decreed that said F. A. Gillespie be, and is hereby, assessed with said sum of

\$538,637.12, and the auditor refuses to exclude the same from his said income, but includes the same, making his aggregate assessment for said year \$647,446.16 and that he be, and is hereby, allowed general deductions in the sum of \$244,823.35, and exemptions in the sum of \$4,000.00, making his taxable income for the year 1915, \$398,617.81, and the tax computed thereon amounts to \$7,772.35, which, credited by the amount heretofore paid by him, leaves due thereon the sum of \$6,289.46, and that there have accrued thereon, and there are assessed and levied against the same, the sum of \$471.74 as penalties.

It is, therefore, by the Auditor further ordered, adjudged and decreed that the income of said F. A. Gillespie, for the year 1915, and said F. A. Gillespie, be and are hereby assessed with, and there is levied thereon and against the same, additional taxes in the sum of \$6,289.46 and penalties in the sum of \$471.74 aggregating the sum of \$6,761.20, and that said F. A. Gillespie be, and he is hereby, ordered to pay said additional taxes and penalties immediately, and, in default of said payment, that warrant issue therefore, as by law provided, and that said State of Oklahoma, have execution of said warrant.

To which order, judgment or decree, and actions and rulings of the Auditor, said F. A. Gillespie then and there excepted, and still excepts.

FRANK C. CARTER,

Auditor of the State of Oklahoma.

And thereafterward, to-wit, on said same day, said F. A. Gillespie filed with and before said Auditor his Written Complaint, specifying his grievance, which said Written Complaint is in words and figures following:

STATE OF OKLAHOMA,

County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

THE STATE OF OKLAHOMA, Plaintiff,

VS.

F. A. GILLESPIE, Defendant.

101 In the Matters of Income Returns and Assessments of F. A. Gillespie for the Years 1915, 1916, 1917, and 1918.

Consolidated.

Written Complaint.

Comes now F. A. Gillespie, and feeling himself aggrieved by the assessments of the Auditor, and his actions, rulings, orders, judgments or decrees, in the above entitled matters, proceedings or causes, files this, his written complaint, specifying his grievances, as follows:

1. Because said Auditor erred in including the income derived by your Taxpayer from said leases on restricted Indian lands, for each and all of said years, 1915, 1916, 1917 and 1918, and should have excluded the same, for the reasons set forth in said Supplemental Returns, and each of them, which are hereby referred to and hereby made a part hereof, as if set forth and copied herein.

2. Because said State of Oklahoma, and its said Auditor, are without power, right or authority to assess any additional taxes, or penalties or both, upon said income from said restricted Indian Lands, and without such power, right or authority to revise said Original Returns and Assessments heretofore made by said Auditor for each of said years, and because your taxpayer has no income for either or all of said years upon which an additional income tax should or could be assessed and levied, without the inclusion of said income claimed as exempt from taxation by the State of Oklahoma, in and by said Supplemental Returns, and which is exempt, for the reasons set forth therein, which are hereby referred to, and hereby made a part hereof, the same as if set forth and copied herein.

3. Because said Statutes of Oklahoma imposing, purporting, pretending or attempting to impose, a tax upon said income from said leases on said restricted Indian Lands, are opposed to, and in violation and contravention of, the Constitution, Laws, Treaties and Agreements of the United States, and of the Constitution of the State of Oklahoma, as set forth in each and all of said Supplemental Returns, respectively, which are hereby referred to, and hereby made a part hereof, the same as if set forth and copied herein.

4. Because the income upon and against which said Auditor has assessed and levied the taxes and penalties upon the said income disclosed by said Supplemental Returns, and each of them, is exempt from taxation by said State of Oklahoma, and the assessment and levy thereof by said Auditor is null, void, and of no force and effect, and is opposed to, and in contravention of said Constitution, Laws, Treaties and Agreements of the United States, and of the Constitution of the State of Oklahoma, for the reasons set forth in said Supplemental Returns, and each of them, and the same are hereby referred to, and hereby made a part hereof, the same as if set forth and copied herein.

Wherefore, Said F. A. Gillespie, the defendant in the above entitled matters, proceedings or causes, prays that the Auditor set aside and for naught hold his said orders, judgments or decrees herein assessing said income with an income tax, and penalties thereon, and that said defendant be relieved from the same, and that he go hence without being ordered, directed or required to pay any additional income taxes or penalties by reason of the premises.

F. A. GILLESPIE,
By JAMES P. GILMORE,
His Attorney.

And thereafterward, to-wit, on said same day, with the consent and agreement of the parties, and waiver of any and all notice thereof, said Written Complaint was regularly heard by said Auditor, and he made and entered his order thereon, which said order is in words and figures following:

STATE OF OKLAHOMA,

County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

THE STATE OF OKLAHOMA, Plaintiff,

VS.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments of F. A. Gillespie for the Years 1915, 1916, 1917, and 1918.

Consolidated.

Now, on this the 6th day of February, A. D., 1920, the State of Oklahoma appearing by W. R. Bleakmoore, its Assistant Attorney General, and representative of S. P. Freeling, the Attorney General of said State, and F. A. Gillespie appearing by James P. Gilmore, his attorney, and all the parties waiving any and all notice, and all parties in open hearing, agreeing and consenting to the hearing on the Written Complaint of said F. A. Gillespie herein filed, and said Written Complaint coming on regularly to be heard, and in accordance with said agreement, and the Auditor having seen, read,

and heard said Written Complaint, and being fully advised
103 in the premises, doth deny and overrule said Complaint, and it is by the Auditor ordered, adjudged and decreed, that the orders, judgments, decrees, rulings and actions of the Auditor complained of, be, and the same are hereby, sustained, and re-affirmed and that each of them stand and be enforced as therein and thereby ordered, adjudged and decreed.

To which said action and ruling of the Auditor, said F. A. Gillespie then and there excepted, and still excepts.

And thereupon said F. A. Gillespie, in open hearing before said Auditor, asked and prayed an appeal to the District Court of Oklahoma County, Oklahoma, which appeal is by the Auditor allowed, and it is hereby ordered by the auditor that a Transcript as required by law, be prepared, and certified as required by law, or as agreed upon by all the parties hereto.

FRANK C. CARTER,
Auditor of the State of Oklahoma.

And thereafterwards, to-wit, on said same day, said parties to said matters, proceedings or causes, filed herein and with and before said Auditor their stipulation and agreement, agreeing as to this Tran-

script, and the certification thereof, and said Auditor entered his order upon, and in accordance with said stipulation and agreement, which said stipulation and agreement, and said order so made are in words and figures following:

STATE OF OKLAHOMA,

County of Oklahoma, ss:

Before the Auditor of the State of Oklahoma.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments of F. A. Gillespie for the Years 1915, 1916, 1917, and 1918.

Consolidated.

It is hereby stipulated and agreed by and between the parties hereto, that the above and foregoing, together with the following certificate, is a true, correct, and complete copy and transcript of all the proceedings in said matters, proceedings or causes, including the pleadings and filings filed therein, and proceedings had, and the evidence offered and introduced, all orders, judgments or decrees and actions taken and rulings made, and all exceptions allowed, and all of the record upon which the orders, judgments and decrees of said Auditor therein were made, and the parties hereto, and each of them, hereby waive, any and all certification thereof, and waive any certification thereof by the stenographer of the County Court of said Oklahoma County, Oklahoma, and hereby agree that the certification hereinafter following by said Auditor shall be taken as and for the only certification necessary to be made thereto, and hereto, and hereby join in the request that said Auditor do certify said Transcript and that the same be taken as such.

S. P. FREELING

Attorney General.

By W. R. BLEAKMOORE,

Assistant Attorney General,

for the State of Oklahoma, said Plaintiff.

JAMES P. GILMORE,

Attorney for said F. A. Gillespie, said Defendant.

Now, on this the 6th day of February, A. D., 1920, upon, in accordance with, and agreeable to, said above and foregoing stipulation of the parties hereto, it is hereby ordered and adjudged by the Auditor of the State of Oklahoma, that the above and foregoing Transcript be, and is hereby accepted, as such full, true, correct and complete

transcript, and that the Auditor certify the same as therein agreed, and herein ordered.

FRANK C. CARTER,
Auditor of the State of Oklahoma.

STATE OF OKLAHOMA,
County of Oklahoma, ss.:

I, F. C. Carter, the Auditor of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of the record in the above entitled matters, proceedings or causes, consolidated.

In witness whereof, I have hereunto set my hand, this the 6th day of February, A. D., 1920.

FRANK C. CARTER,
Auditor of the State of Oklahoma.

105 STATE OF OKLAHOMA,
County of Oklahoma, ss.:

In the District Court Within and for said County and State.

No. 27439.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

In the Matter of Income Returns and Assessments of F. A. Gillespie for the Years 1915, 1916, 1917, and 1918.

Demurrer.

Comes now the State of Oklahoma, plaintiff, and demurs to the answer, protest, and supplemental returns filed herein by the defendant, for the reason that the same do not state a cause of action or grounds for relief in favor of the defendant and against the plaintiff herein.

THE STATE OF OKLAHOMA,
By S. P. FREELING,
Attorney General.
C. W. KING,
Assistant Attorney General.

STATE OF OKLAHOMA,
County of Oklahoma, 38.

In the District Court Within and for said County and State.

No. 27439.

THE STATE OF OKLAHOMA, Plaintiff,

vs.

F. A. GILLESPIE, Defendant.

106 In the Matter of Income Returns and Assessments of F. A. Gillespie for the Years, 1915, 1916, 1917, and 1918.

Journal Entry.

Now on this the 16th day of April, A. D., 1920, this cause having heretofore come on regularly for hearing and trial on the 27th day of February, A. D., 1920, and on that day the plaintiff herein appearing by its attorneys, S. P. Freeling, Attorney General and C. W. King, Assistant Attorney General, of the State of Oklahoma, and the defendant appearing by James P. Gilmore, his attorney, and by agreement of the parties hereto in open Court, and with the consent of the court, said plaintiff herein filing its demurrer to each and all of the supplemental returns filed before the Auditor of the State of Oklahoma, for the years, 1915, 1916, 1917 and 1918, and appearing and being a part of the transcript herein on appeal from said Auditor, and it being agreed by and between the parties hereto, in open Court, that the issues on this appeal and in this case shall and will be tried upon the allegations in said transcript, claiming exemption from taxation on the income of said defendant as therein disclosed and alleged, and by agreement of the parties, and with the consent of the court, it being agreed that the issues in this cause on said appeal from said Auditor of the State of Oklahoma, shall and will be tried upon said allegations of exemption as set forth in and by said supplemental returns, and each and all of them, and said transcript and on said demurrer herein filed; and the court having seen and heard said supplemental returns and each of them and said transcript of appeal from said auditor of the State of Oklahoma, and said demurrer, and the same having been argued by the counsel for both parties hereto, and being fully advised in the premises and said cause having by the court been taken and had under advisement until this date, and the court being fully advised in the premises, overruled said demurrer and holds that said supplemental returns, and each and all of them and said transcript, state and allege facts entitling said defendant to the exemptions therein and thereby disclosed, and from and against any penalties thereon; to all of which ruling the State of Oklahoma, plaintiff herein, duly excepts and in open court gives notice

of appeal from said ruling and judgment to the Supreme Court of the State of Oklahoma.

And said plaintiff, the State of Oklahoma, now elects to and does stand upon said demurrer and refuses to further plead, and thereupon, the court does find each and everyone of the issues in said cause in favor of the defendant and against the plaintiff and
107 being fully advised in the premises finds that said assessments of taxes and each item thereof, as shown by the several supplemental returns and reports made and filed in said cause, are illegal and void and that the income so taxed is exempt from taxation under the laws and acts of Congress, and the attempted collection thereof is in violation of the Constitution of the State of Oklahoma and of the United States.

It is, therefore, by the court, ordered, adjudged and decreed that the action of the said auditor of the State of Oklahoma, assessing, levying and enforcing payment of said additional taxes on the income of said defendant and penalties thereon, be and the same is hereby annulled, set aside and cancelled.

And, it further appearing to the court, and the court so finding that under the statutes of the state of Oklahoma, and the order and direction of said State of Oklahoma, said F. A. Gillespie, defendant herein, heretofore, pending appeal and as required by the Statutes of Oklahoma, paid to said State Auditor the amount of said taxes and penalties so illegally assessed and levied against and collected from the said F. A. Gillespie, by the said State Auditor, for said years, 1915, 1916, 1917 and 1918, in the aggregate sum of \$35,778.41, and that said Auditor of the State of Oklahoma has received said payment in said sum under protest, and segregated the same, as required by the statutes of Oklahoma. It is by the Court further ordered, adjudged and decreed that said defendant have and recover of and from said plaintiff said sum so paid, and said Auditor of the State of Oklahoma is hereby authorized, empowered and directed to refund and pay to said F. A. Gillespie, said defendant, said sum so illegally assessed and levied against and collected from him as aforesaid.

To which judgment of court and each ruling therein contained, the plaintiff, the State of Oklahoma, duly excepts and in open court gives notice of appeal to the Supreme Court of Oklahoma. Said judgment is, therefore, in all things, hereby superseded, pending the prosecution of said appeal and the judgment of the Supreme Court.

(Signed)

GEO. W. CLARK,
Judge.

108 In the Supreme Court of the State of Oklahoma.

No. —.

THE STATE OF OKLAHOMA, Plaintiff in Error,

VS.

F. A. GILLESPIE, Defendant in Error.

Certificate of Court Clerk.

STATE OF OKLAHOMA,

County of Oklahoma, ss:

I, Cliff Myers, Court Clerk for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of this Court this 24th day of April, 1920.

CLIFF MYERS,

Court Clerk,

By CHAS. COLT,

Dept.

Acceptance of Notice of Appeal, and service of summons in error, and entry of appearance in Supreme Court made this 24th day of April, 1920.

JAMES P. GILMORE,

Attorney for Defendant in Error.

[SEAL.]

Filed in Supreme Court of Oklahoma Apr. 24, 1920.

WILLIAM M. FRANKLIN,

Clerk.

Endorsed on Cover of said Transcript: No. 11,356. The State of Oklahoma, Plaintiff in Error, vs. F. A. Gillespie, Defendant in Error. Transcript. Filed in District Court, Oklahoma County, Oklahoma, Apr. 24, 1920. Cliff Meyers, Court Clerk, by Dan Smith, Deputy. Filed in Supreme Court of Oklahoma, Apr. 24, 1920. William M. Franklin, Clerk.

109 And thereafter, to-wit: on the 20th day of October, 1920, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, October Term, 1920, October 20th, 1920, Fourth
Judicial Day.

11356.

STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

And now on this day the above cause is argued orally and submitted, and it is ordered by the court that defendant in error be allowed 15 days to file brief in said cause.

110 And thereafter, to-wit: on the 14th day of December, 1920, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, December Term, 1920, December 14th, 1920, Fifth
Judicial Day.

11356.

STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause be, and the same is hereby affirmed.

Opinion by Kane, J.

Rainey, C. J., Pitchford, Johnson, McNeill and Higgins, J. concur.

111 Filed in Supreme Court of Oklahoma Dec. 14, 1920.
William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Syllabus.

The State is prohibited from levying or collecting taxes upon the income derived by a lessee from the lease of Indian lands under the supervision and approval of the Secretary of the Interior by the same considerations which led the Supreme Court of the United States to prohibit the State from taxing the gross production derived from such leases in what is known as the gross production tax cases, to-wit: Choctaw & Gulf R. R. Co. vs. Harrison, 235 U. S. 292, 59 L. Ed. 234; Howard vs. Gypsy Oil Co. 247 U. S. 504, 62 L. Ed. 1239; Large Oil Co. vs. Howard, 248 U. S. 549, 63 L. Ed. 416.

Error from the District Court of Oklahoma County.

Hon. George W. Clark, Judge.

Affirmed.

S. P. Freeling, Atty. Gen., C. W. King, Asst. Atty. Gen., for Plaintiff in Error.

James Patrick Gilmore, for Defendant in Error.

112 KANE, J.:

This is an appeal from an order of the district court of Oklahoma county exempting the defendant in error from paying taxes upon income accruing from the sale of oil produced from departmental leases on restricted indian lands. Inasmuch as there is no disagreement between the parties as to the facts nor as to the question of law arising therefrom, no detailed statement of the record made below is necessary in order to pass upon the only question presented for review. The parties agree that the Attorney General correctly states the question of law at issue in his brief as follows:

"The only question presented other than the one of penalties is whether or not the state is prevented from collecting income tax from leases on indian lands under the supervision and approval of the Secretary of the Interior upon the same considerations which led

the court to deny that right to the State in what is known as the gross production tax cases, to-wit: Choctaw & Gulf R. R. Co. vs. Harrison, 235 U. S. 292, 59 L. Ed. 234; Howard vs. Gypsy Co. 247 U. S. 504, 62 L. Ed. 1239; Large Oil Co. vs. Howard, 248 U. S. 549, 63 L. Ed. 416."

As it is agreed between counsel that under the cases just cited it is settled law that oil and gas leases of lands in Oklahoma made by or on behalf of restricted indians under authority of an Act of Congress are under the protection of the Federal Government and that the lessees are Federal Agencies in whose hands the leases cannot be taxed either directly or vicariously, it will not be necessary to notice any of the aspects of the case at bar except those which the Attorney General contends distinguish it from the cases cited.

Conceding the non taxability of the source of the income sought to be taxed, viz., the oil and gas leases, the Attorney General argues that, keeping in mind the proper conception of income taxation, it cannot be said that because such income was derived from the sale of oil and gas, which oil and gas was derived from the restricted indian lands, such income is exempt from taxation on the
113 ground that it constituted an unlawful burden upon a Federal Agency or instrumentality. The income sought to be taxed says the Attorney General, "is net income determined after the close of the preceding year's business after it has been determined that, less all expenses and necessary expenditures of every nature, there still remains in the hands of the tax payer a net income. This net income so remaining is the thing that is taxed and its taxation cannot possibly amount to a burden upon the exercise of a Federal Agency."

In this connection the Attorney General also contends that the 16th amendment to the Constitution of the United States had for its sole purpose the separation of income from its source for the purpose of taxation and therefore the ruling in Pollack vs. Union Trust Co. 157 U. S. 429 and 158 U. S. 601, cited by counsel for the appellant, to the effect that when the property itself cannot be taxed by a state then the income derived from that property or source is equally exempt from the imposition of a tax, is no longer applicable. In disposing of this last contention first it is sufficient to say that the 16th amendment does not purport to confer any additional power or authority on the states but is confined exclusively to granting power to Congress to lay and collect taxes on incomes from whatever source derived without apportionment among the several states and without regard to any census or enumeration. Aside from the necessity of apportionment of income taxes imposed by Congress from sources that would be direct or capitation taxes, without the amendment, the taxing powers of the United States and the states are the same as before the adoption of the amendment, and not a single restriction or limitation imposed upon the state by the constitution of the United States has been removed. In other words the 16th amendment was not adopted to confer upon Congress the power which it already had to tax incomes, but simply to

114 relieve it from the necessity of apportioning such taxes among the several states, when such income should be derived from either real estate or personal property, since the doctrine then was, and now is, that such income tax was a direct tax; because, in effect, a tax upon the source of the income.

The case therefore of Pollack vs. Union Trust Co., supra, has not been modified by the amendment except as to the requirement of apportionment of taxes derived from real estate and personal property. The natural and correct meaning of the act is the same as that case declared and merely the rule of apportionment has been abrogated. This being true, the powers of the state in the matter of taxing the incomes derived from these leases by a Federal Agency is not affected. Every limitation or restriction imposed by the Constitution upon the state remains absolutely unabated and without change. As was held in Brushber vs. Union Pacific R. R. Co. 240 U. S. 1, 60 L. Ed. 493, the purpose of the amendment was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the source from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source of the income itself and thereby to take an income tax out of the class of excises, duties and imports and place it in the class of direct taxes.

In Pollack vs. Union Trust Co., supra, in which certain income tax laws enacted by Congress prior to and leading up to the 16th amendment were held invalid, the court clearly holds that when the property itself cannot be taxed by the Federal Government or by a state the income derived from that property or source is equally exempt from the imposition of the tax. Having reached

115 the conclusion that the power of the state in the matter of taxing the income accruing to the lessees from these departmental oil and gas leases is not affected by the 16th amendment it is impossible to distinguish the case at bar from the cases first cited and particularly from Large Oil Co. vs. Howard, supra.

In the Large Oil Co., case the act of the Legislature of May 14, 1916, commonly known as the Gross Production Tax Law was under consideration. The tax was assailed on two grounds. First, as an attempt to levy a privilege or occupation tax and therefore invalid as to oil and gas produced through the operation of a Federal Agency, and, second, that the oil and gas contained or secured from lands of the Osage Nation is exempt from the operation of the tax. This court clearly stated the principles exempting the subject matter involved from the operation of the state law but, following the contention of the Attorney General, upheld the law upon the theory that the act imposed a property tax, and in this respect the case was distinguishable from Choctaw, Oklahoma & Gulf R. R. Co. vs. Harrison, supra, wherein the Supreme Court held that the act of the Legislature of 1908 was invalid because it attempted to impose an occupation or privilege tax upon a Federal Agency. The Supreme Court of the United States without noticing this distinction reversed the case in a memorandum opinion upon the authority of Choctaw

& Gulf Ry. Co. vs. Harrison, supra, and the other cases hereinbefore cited.

As we believe those cases are controlling on the question now under consideration it follows that the judgment of the court below must be affirmed.

Rainey, C. J., Pitchford, Johnson, McNeill and Higgins, JJ. concur.

116 Filed in Supreme Court of Oklahoma Dec. 28, 1920. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

THE STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

Petition for Rehearing.

Comes now the Plaintiff in Error and petitions the court to grant it a re-hearing in the above styled and entitled cause and in support for said petition for rehearing, states that the court in rendering its decision, overlooked controlling provisions of the Constitution of Oklahoma and statutes of the State of Oklahoma and other states and controlling decisions of the Supreme Court of the United States.

The court erred in its opinion in holding in effect that the State Income Tax Law of the State of Oklahoma is a tax upon the property and activities from which the income is derived, against which the income tax is assessed.

The court erred in its decision in not holding the Oklahoma Income Tax Law to be generic form of taxation upon income as such and that the tax may obtain even through the source of the income may be property exempt from taxation.

The court erred in its decision in holding that the line of cases commonly referred to as the Gross Production cases is controlling and constitutes authority for holding the income tax derived from income of a lessee of restricted Indian Lands, upon oil and
117 gas produced therefrom, constitutes unlawful burden upon a Federal agency.

The Court erred in its decision in failing to hold that the income tax sought to be collected in this case, being a net income tax upon the income resulting from the sale of the lessee's share of oil and gas, is too remote to constitute an unlawful burden upon a Federal Agency.

Wherefore, Defendant in Error prays that a rehearing be granted herein; that Plaintiff in Error be permitted to argue this petition

orally and that upon consideration thereof, the judgment of the trial court be reversed and the tax held valid.

Respectfully submitted,

S. P. FREELING,
Attorney General;

C. W. KING,
Assistant Attorney General,
Attorneys for Plaintiff in Error.

118 And thereafter, to-wit: on the 5th day of April, 1921, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, February Term, 1921, April 5th, 1921, Twelfth Judicial Day.

No. 11356.

STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed with instructions.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed with instructions to render judgment sustaining said tax and authorizing execution for the collection of same with costs of suit.

Opinion by Harrison, C. J.

All the Justices concur except Kane and Miller, JJ., who dissent.

119 Filed in Supreme Court of Oklahoma Apr. 5, 1921. William M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 11356.

STATE OF OKLAHOMA, Plaintiff in Error,

vs.

F. A. GILLESPIE, Defendant in Error.

1. The validity of the 'income tax' provided for in Chap. 164, Sess. L. 1915, as distinguished from a general ad valorem tax, is sustained.

2. The validity of the 'income tax' provided for in Chap. 164, Sess. L. 1915, as applied to the lessee's private share of oil and gas produced under Departmental leases on restricted lands, is sustained on authority of *In re Protest of Skelton Lead & Zinc Co.*, — Okla. —, not yet reported.

Error from the District Court of Oklahoma County.

Hon. Geo. W. Clark, Judge.

Reversed.

S. P. Freeling, Atty. Gen., C. W. King, Asst. Atty. Gen., for Plaintiff in Error.

Jas. P. Gilmore, for Defendant in Error.

120 *Opinion of the Court by Harrison, C. J.*

This case is here upon appeal from the district court, by the State of Oklahoma through its Attorney General. The decisive questions involved are: (1), whether the income tax laws of the State are valid, and (2), whether the State has power to levy such a tax upon incomes derived from the Lessee's private personal share of oil and gas produced under Departmental leases upon restricted Indian lands.

As to the validity of an income tax in the abstract, as distinguished from a general ad valorem tax upon property, the validity of such tax has been so often sustained as to settle the question. See *Alderman v. Wells* (S. C.) 67 S. E. 781, 27 L. R. A. (N. S.) 864-5, and notes; *Tyce Realty Co. v. Anderson—Thorn v. Anderson* (Consolidated), 240 U. S. 115, 60 L. Ed. 554-5; *Peck & Co. v. Lowe*, 247 U. S. 165-172, 62 L. Ed. 1049; *Northwestern Mutual Life Ins. Co. v. State of Wisconsin*, 62 L. Ed. 1035; *State v. Frear* (Wis.) 134 N. W. 637, 26 A., & Enc. Ann. Cas. 1147; *Black on Income Taxes*, Sec. 187; and *Shaffer v. Carter* (Okla.) 252 U. S. 37, wherein it was held, not only that the income tax of Oklahoma was not a burden upon interstate commerce, but also that the 'gross production tax' of Oklahoma was equivalent to an ad valorem 'property tax.' Upon these authorities, and the provisions of Article 10, Section 12, Constitution of Oklahoma, Chap. 164, Sess. L. 1915, and the validity of the income tax therein levied is sustained.

As to the second proposition, the question of validity of the precise tax here involved depends primarily upon the validity of the 'gross production tax' provided for in Chap. 39, Sess. L. 1916, as applied to the Lessee's private share of the products from Departmental leases upon restricted lands, and, the 'gross production tax' being a 'property tax,' as was held by the Supreme Court of the United States in *Shaffer v. Carter*, supra, the validity of which, as a 'property tax' upon the same class of property here involved, was sustained by this court at this term in *In re Protest of Skelton Lead & Zinc Co.*, #11194, not yet reported, then upon the

authority of said cases and the reasons therein given, the validity of the income tax involved herein is sustained.

The judgment of the trial court is reversed with instructions to render judgment sustaining said tax and authorizing execution for the collection of same with costs of suit.

Justices Kane and Miller dissent.

All other Justices concur.

122 In the Supreme Court of the State of Oklahoma

Certificate.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 121 pages, numbered from 1 to 121 inclusive, is a true and complete transcript of the record and all proceedings in said Supreme Court in the case of State of Oklahoma, Plaintiff in Error, vs. F. A. Gillespie, Defendant in Error, Number 11,356, as the same remains upon the files and records of said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Oklahoma City, Oklahoma, this the 5th day of May, A. D. 1921.

[Seal of the Supreme Court of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma.

Endorsed on cover: File No. 28,269. Oklahoma, Supreme Court. Term No. 912. F. A. Gillespie, plaintiff in error, vs. The State of Oklahoma. Filed May 14th, 1921. File No. 28,269.



Office Supreme Court, U.S.
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CLERK

OF THE

Supreme Court of the United States

OTOMBE TERM, 1921

No. 102

F. A. GILLERFIE

Plaintiff in Error

vs

THE STATE OF OKLAHOMA

Defendant in Error

F. A. GILLERFIE

Petitioner

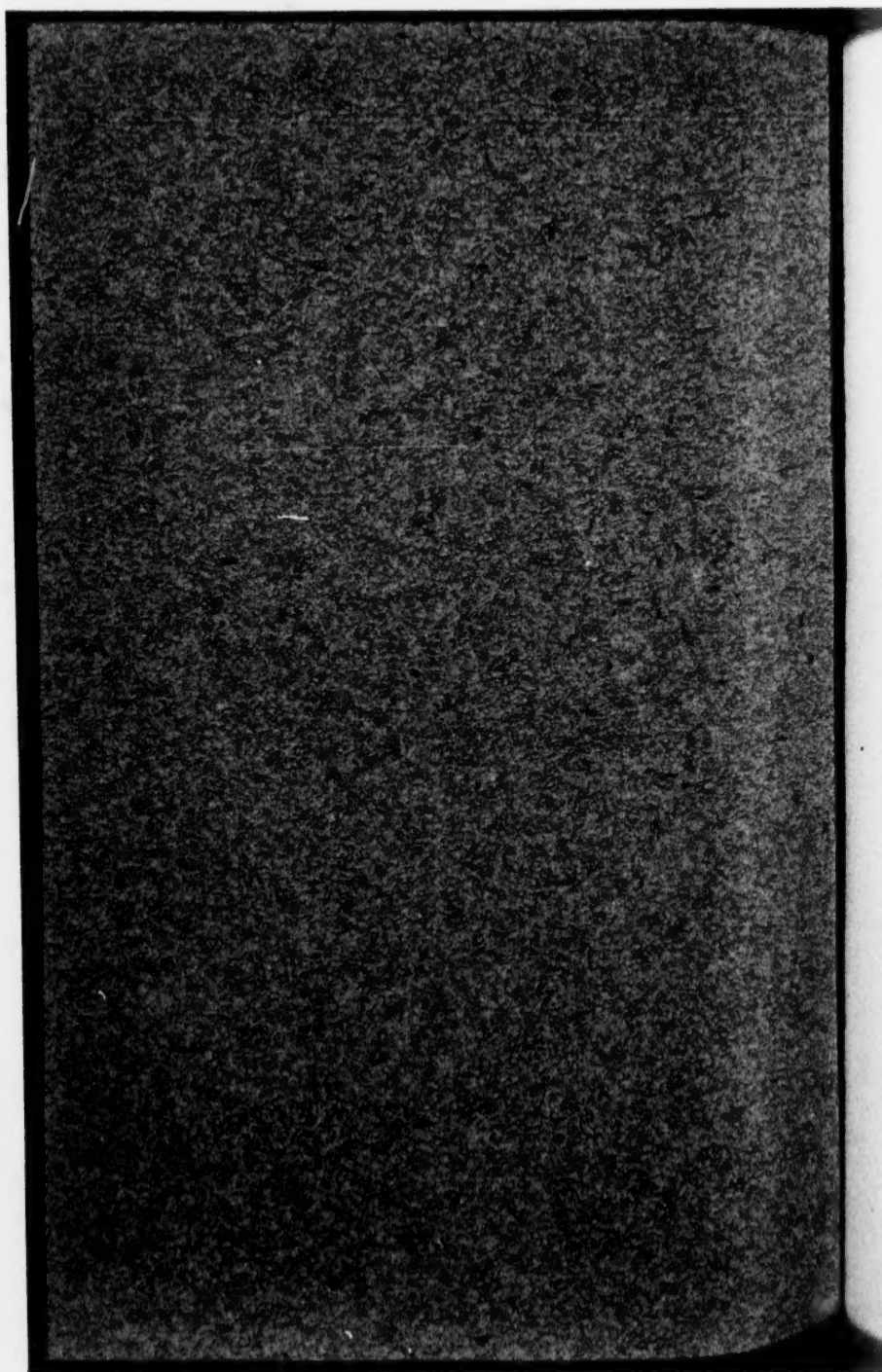
vs

THE STATE OF OKLAHOMA

Respondent

BRIEF FOR PLAINTIFF IN ERROR AND
PETITIONER

JOHN F. FARMER, Counsel
Attorney for Plaintiff in Error and Petitioner



INDEX.

Subject Index.

	Page
Statement (Showing Underlying Facts and Record) .	1-25
Opinion of Justice Kane, Printed Record, Page 69	16, 63, 98, 114, 178
Specification or Assignment of Errors.	26
Points and Authorities (Showing Propositions and Authorities Supporting Same)	27-201
(I) The leases involved, and the defendant as the lessee, are instrumentalities of the Government of the United States, through which it is dis- charging its duty to the Indians, and are instru- ments and means employed by Congress to car- ry into effect the powers conferred upon it by the Federal Constitution	27-31
(II) The States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control or affect, in the slightest de- gree, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Government of the United States, and cannot tax to any extent the instru- mentalities and agencies of the Federal Govern- ment, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution, and any tax imposed, or any attempt to impose a tax, therefor or there- on, however slight or insensible its effect may be, or no appreciable effect appearing, is re- pugnant to the Constitution of the United States. The State is absolutely without any authority to so tax	32-61

INDEX.

	Page
(III) The leases themselves not being taxable by the State of Oklahoma, that State is wholly without power, right or authority to tax the income derived therefrom	62-94
(IV) The State of Oklahoma has no right, power or authority to tax income derived solely from oil and gas leases upon restricted Indian lands subject to the control of Congress, and the Approval of the Department of the Interior, and its control and regulation, inasmuch as such a tax would be one upon a Federal Agency, and upon an instrumentality or means employed by Congress to carry into effect the powers conferred by the Constitution upon Congress, and, therefore, if the Act of the Legislature, approved March 17th, 1915, and as amended, be applied to such income by the State of Oklahoma, or by its officers, agents or representatives, the same is unconstitutional and void, and in contravention and violation of the Constitution, Laws, Treaties and agreements of the United States	95-177
(V) The cases cited and relied on by the State of Oklahoma, in the Supreme Court of Oklahoma, do not govern the case at bar, and are clearly distinguishable from this case, and the cases cited as controlling its decision.	178-198
(VI) Discussion of Decision in case of In Re Protest of Skelton Lead & Zinc Co., 197 Pac. Rep. 495	199-201

INDEX.

Alphabetical List of Constitutional and Statutory Provisions and Cases Cited.

	Page
United States Constitution—	
Sixteenth Amendment	83
Oklahoma Constitution—	
Section 12, Article 10	23
Oklahoma Statutes—	
Section 1, Act of March 17, 1915	23
Section 5, Act of March 17, 1915	23
Appendix (Showing Oklahoma Income Statutes Entire)	202-211

Cases Cited.

Brown vs. Maryland, 12 Wheat. 419	47
Brushaber vs. Railroad, Cp. 240 U. S. 1	84
Buffington vs. Day, 11 Wall. 115	449
California vs. Railroad Co., 127 U. S. 1	59
Dobbins vs. Erie County, 16 Pet. 435	141
Eisner vs. Macomber, 252 U. S. 189	88
Evans vs. Gore, 253 U. S. 245	89, 151
Farmers & Merchants Savings Bank vs. Minnesota, 232 U. S. 516	60, 126, 185
Howard vs. Gypsy Oil Co., 247 U. S. 504	28, 100
Howard vs. Indian Territory Illuminating Oil Co., 247 U. S. 504	100, 124
Howard vs. Okla. Oil Co., 247 U. S. 504	100, 124
Howard vs. Barnsdall Oil Co., 247 U. S. 504	100, 124
Indian Territory Illuminating Oil Co. vs. Oklahoma, 240 U. S. 522	2, 28, 62, 99, 101, 132, 184, 199

INDEX.

	Page
In Re Gross Production Tax of Wolverine Oil Co.	30, 170
In Re Skelton Lead & Zinc Company's Gross Production Tax, 197 Pac. Rep. 495.	21, 173, 199
Large Oil Co. vs. Howard, 248 U. S. 549. 2, 29, 100, 199	
Large Oil Co. vs. Howard, 63 Okla.	29, 169, 180
McCulloch vs. Maryland, 4 Wheat. 316.	34, 182
Mosely vs. State, 115 Tenn. 57.	78
Osborn vs. Bank, 9 Wheat. 739.	138
Peck & Co. vs. Lowe, 247 U. S. 163.	87
People vs. Commissioners, 2 Black. 620.	49
Pollock vs. Loan & Trust Co., 157 U. S. 429	64, 83, 101, 116, 179, 189, 194
Pollock vs. Loan & Trust Co., 158 U. S. 601.	75, 83
Purnell vs. Page, 133 N. C. 126.	150
Railroad Co. vs. Harrison, 235 U. S. 292.	2, 27, 99, 116, 118, 131, 137, 181, 183.
Shaffer vs. Carter 252 U. S. 57.	191
Tiger vs. Western Investment Co., 221 U. S. 286.	174
United States vs. Railroad Co., 17 Wall. 322.	155, 193
United States Glue Co. vs. Oak Creek, 247 U. S. 321	187
Van Brocklin vs. Anderson, 117 U. S. 151.	57
Western Union Telegraph Co. vs. Texas, 105 U. S. 460	157, 164, 193
Weston vs. Charleston, 2 Pet. 449.	44, 183
Williams vs. Talladaga, 226 U. S. 404.	160, 194

IN THE
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 322.

F. A. GILLESPIE,
Plaintiff in Error,
vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

F. A. GILLESPIE,
Petitioner,
vs.

THE STATE OF OKLAHOMA,
Respondent.

STATEMENT.

The State of Oklahoma, now the Defendant in Error, and Respondent, was the plaintiff below, and F. A. Gillespie, now the Plaintiff in Error, and Petitioner, was the defendant, and, for convenience, we shall hereafter refer to them respectively, as the plaintiff and defendant.

The cause is before this court by writ of error to the Supreme Court of the State of Oklahoma, and also by petition for writ of certiorari, out of abundance of caution, accompanied by a stipulation of the parties covering the petition for writ of certiorari.

There is absolutely no dispute as to the facts in this case, so far as any question presented to this court.

The case originated in the office of, and before, the Auditor of the State of Oklahoma, and arose from the attempted imposition of taxes on the income of the defendants derived solely from oil and gas leases on Indian lands, commonly known as departmental leases, with like restrictions as those heretofore involved in the cases of *Railroad Co. v. Harrison*, 235 U. S. 292, *Howard v. Gypsy Oil Co.*, 247 U. S. 504, *Large Oil Co. v. Howard*, 248 U. S. 549, and *Indian Territory Illuminating Oil Co. v. State of Oklahoma*, 240 U. S. 522, heretofore decided by this court.

The defendant had other income, taxable under the Income Statutes of the State of Oklahoma, and had paid his State income tax thereon for the years 1915, 1916, 1917 and 1918, respectively, at all times claiming the income from his oil and ^{gas} leases on these Indian lands, under the supervision of the Government of the United States, and with restrictions just noted, was exempted from taxation by the State of Oklahoma. The State Auditor, however, claimed this income was taxable by the State of Oklahoma, and the petitioner, as such taxpayer, claiming the income exempt from taxation by the State of Oklahoma, on the authority of the cases before mentioned,

and other similar authorities, filed his Supplemental Returns, for each of those years, respectively in connection with his Original Returns for those years, showing the amount of income derived solely from such Indian leases, and claiming such exemption from such taxation. (Printed Record, pages 14 to 53, inclusive.)

The defendant, for the years, 1915, 1916, 1917 and 1918, made the usual return of his net annual income, the tax was computed and assessed by the State Auditor, and the defendant paid the amount in the usual course, and at the time required by law. In the latter part of 1919, however, the Auditor of the State of Oklahoma sent his representative, who went over the books and accounts of the defendant, and, including the income derived from what are usually denominated departmental leases, determined that sufficient net income had not been returned and paid on for the years 1915, 1916, 1917 and 1918. It was then, and has always been, the contention of the defendant that such income could not rightfully be taxed by the State, and that he had returned and paid on all the net income he could be required to return and pay on.

Upon the contention being made that the defendant had not returned and paid upon as much net income as he should have returned and paid upon, under arrangements made with the State Auditor and the Attorney General, the defendant made supplemental returns for each of these years, setting forth his income in detail, specifically indicating the amount of income derived from the departmental leases on restricted Indian lands,

and in each of the supplemental returns claiming such income as exempt from taxation by the State of Oklahoma, and fully setting forth the grounds upon which the claims for exemption were made.

The supplemental returns are clearly connected with the original returns made by the defendant, and each clearly shows the amount of income received from the departmental leases on restricted Indian lands, for which exemption from taxation is claimed, and there is no dispute as to the amount in each instance.

The supplemental returns show that the defendant was, and is, the owner of one departmental lease on lands of a Creek citizen, and member of the Creek Tribe or Nation of Indians, and also certain leases in the Osage Nation, or on lands included in what was formerly known as Osage Reservation, now Osage County, Oklahoma.

The supplemental returns fully and clearly set forth the character of the leases involved, and the lease mentioned in paragraph one of the supplemental return is set forth as belonging to Jackson Barnett, a citizen of the Creek Nation or Tribe of Indians, and it alleged that these Indians maintain tribal relations, and are wards of the Government of the United States, and that Jackson Barnett, the particular lessee, is a ward of the United States Government, and his lands are restricted under the laws of the United States; and that, in operating said lease and the lands for oil and gas, the defendant and his co-lessee are doing so under a lease made by the said Indian citizen of the Creek Nation or Tribe of Indians, in accordance with the rules and regulations of

the Department of the Interior, and the provisions of the various Indian treaties and agreements with said Indians, and the Acts of Congress, and under a lease which has been duly and regularly approved by the Department of the Interior, or the secretary thereof; and are acting as the agent of this restricted Indian, who is a ward of the United States Government, in producing oil and gas from his restricted lands. That it was, is and will be, the duty of the Government of the United States to operate and develop his lands, or to provide for the operation or development thereof, for the production of oil and gas therefrom, for the benefit of the Government's said ward, and to see that the oil and gas therefrom is not wasted and destroyed, and that the defendant and his co-lessee are operating the same and producing oil therefrom under and in accordance with the provisions of said laws, the treaties and agreements with the Creek Nation or Tribe of Indians, and the various Acts of Congress relating thereto, and pay a royalty provided for in and by said lease to the Indian Agent or Superintendent in charge of said Creek Nation or Tribe of Indians, and the citizens thereof, and when the royalty is so paid to the Agent or Superintendent it is held by him under and in accordance with the rules and regulations prescribed and promulgated by the Secretary of the Interior, and the various Acts of Congress, in regard thereto, and paid out to such Indian in such sums, and by such methods, as the Secretary of the Interior may order and direct, and in accordance with such rules and regulations govern:-

ing and controlling the same, and the provisions of the various Acts of Congress with respect thereto.

The supplementary returns further allege and show that, under the treaties and agreements of the United States, with the Creek Nation or Tribe of Indians, and particularly under the Act of Congress of May 27, 1908, the Indian owner of the lands set out and described in this lease has no right or authority to make oil and gas mining leases covering his said lands, except as provided for in said treaties and agreements and Acts of Congress, and the rules and regulations of the Department of the Interior governing and controlling the same. That such Indian owner is a ward of the United States as to his restricted lands, and that his lands must be operated and developed for oil, gas and other mineral purposes under and in accordance with said treaties, agreements, Acts of Congress and rules and regulations, and not otherwise.

It is further alleged and shown that the leases on the lands belonging to the Osage Tribe or Nation of Indians, formerly known as the Osage Reservation, now Osage County, Oklahoma, cover lands which were for a long time prior to June 28, 1906, the lands of the Osage Tribe or Nation of Indians and were held in common by these Indians. That on June 28, 1906, Congress passed an Act providing for the allotment of the lands of said Osage Reservation to the individual members of the Tribe or Nation of Osage Indians, which Act, among other things, provided that nothing therein contained should authorize the sale of oil, gas, coal or other min-

erals covered by the lands, reserving to the use of the Tribe or Nation for a period of twenty-five (25) years all such oil, gas and other minerals, the royalty to be paid to the Tribe or Nation as in the Act provided; and providing that the oil, gas, coal and other minerals in and upon such lands should become the individual property of the individual owners at the expiration of such period of twenty-five (25) years, unless otherwise provided by Congress; that all leases for oil, gas, coal and other minerals, during such period covered by the selections, divisions and allotments of said lands provided for, might and should be made by the Osage Tribe of Indians, through its Tribal Council and with the approval of the Secretary of the Interior, and under such rules and regulations as he should prescribe, and that all of the leases described in the supplementary returns were made in pursuance thereof; that the royalties to be paid for any such oil, gas and other mineral leases should be determined by the President of the United States, and that all moneys due, or that might become due, on account thereof, should be held in trust by the United States for the benefit of said Tribe or Nation for a period of twenty-five (25) years from and after the first day of January, 1907, except as otherwise provided, and that all money received as royalties from such oil, gas and mineral leases should be placed in the treasury of the United States to the credit of the Osage Tribe or Nation of Indians, and that the same should be paid out and distributed to the individual members of the Tribe or Nation in accordance with and in the manner prescribed by the Act.

The supplementary returns further show that the Osage Tribe or Nation of Indians, is a ward of the United States, and the members and citizens thereof are wards of the United States, as to their restricted property and rights, and under the control and direction of the Department of the Interior and the secretary thereof, and under the direct control and management of the Indian Superintendent or Agent of such Indians, who had and has general supervision of all the business and affairs of the Tribe or Nation and the individual members thereof, and of the operations on the lands of the Tribe or Nation, and those of the individual members and citizens thereof, for all oil, gas and mineral purposes, and all the operations therefor have been, are now, and will be, conducted under the supervision and control of the Department of the Interior, its secretary and said Indian Agent or Superintendent, and that all the moneys, funds and royalties belonging to the Tribe or Nation, or the members thereof, have been, are now and will be, under such control and management, and have been, are now and will be, paid into the treasury of the United States to be paid out in the manner prescribed by law and in accordance with the rules and regulations prescribed by the Secretary of the Interior; that the United States, being the ultimate owner of the fee of the land embraced in such Osage Reservation, and holding the same in trust for the use and benefit of such Indians, as trustee for them, it became, was, is and will be, the duty of the United States to develop, or to see that the lands belonging to such Nation or Tribe of Indians, were, are and will

be, developed for oil and gas mining purposes, and that its interests should be protected, subserved and prevented from going to waste, and that the proceeds thereof should be properly applied to the maintenance, care and support of such Indians, and the royalties are to be paid into the treasury of the United States and are to be used and expended for the purposes named, under the supervision and control of the United States and its duly appointed representatives and agents.

It is further alleged and shown by the supplementary returns that all of the leases described have been fully approved by the Secretary of the Interior, under and by virtue of the Acts of Congress and the rules and regulations prescribed and promulgated by the Secretary of the Interior, and that the leases and lands covered by them are being operated by the defendant and his co-owners or co-lessees, and the oil and gas produced therefrom, under such laws, treaties, agreements and rules and regulations.

It is further alleged and shown by the supplementary returns that under the constitution and laws of the United States, the Indian Nations or Tribes inhabiting the State of Oklahoma, and the individual members thereof, and the lands and property of such Indians, are under the sole and exclusive jurisdiction of the United States of America, except so far as such jurisdiction may be surrendered to the State of Oklahoma, and that as to such Indian owner of the land described in paragraph one of the said supplementary return, and as to those belonging to the Tribe or Nation of Osage Indians, the

United States, as to their jurisdiction, have not surrendered such jurisdiction to the State of Oklahoma.

It is further alleged and shown by the supplementary returns that, under and by virtue of the Act of Congress of June 16, 1906, providing for the admission of Oklahoma Territory and the Indian Territory as a State of the Union, the people of the proposed State should forever disclaim all right and title to all lands within the limits of the proposed state owned or held by any Indian Nation or Tribe, and that the same should remain subject to the jurisdiction, disposal and control of the United States, and that the constitution of the State of Oklahoma, under Section 3, of Article 1, expressly disclaims any right or title to such lands and expressly provides that the same should remain subject to the jurisdiction, disposal and control of the United States.

It is further alleged and shown by the supplementary returns that, under the constitution and laws of the United States, the Indians, affected as to their restricted lands and property rights, are wards of the United States and under its control and jurisdiction, and the State of Oklahoma has no power, right or authority to pass any laws affecting such property rights of any of the Indians as to their restricted lands and property, and that Jackson Barnett, the owner of the lands leased and mentioned in paragraph one, is an Indian maintaining tribal relations, and that the Osage Tribe or Nation of Indians, and the members thereof, are a Tribe or Nation of Indians maintaining tribal relations, and that said Indian Tribe or Nation, and the individual members thereof, are under

the jurisdiction and control of the Government of the United States and its representatives and agents; that all of the lands set forth and described in the leases are restricted lands, under and by virtue of the various Indian treaties and agreements with such Indians, and the Acts of May 27, 1908, and of June 28, 1906, and other Acts of Congress relating thereto, and that any law enacted and passed by the State of Oklahoma imposing a tax upon such lands, or the oil and gas mining leases thereon, directly or indirectly taxing either or both, or upon the use or occupancy of such lands, or any part thereof, or on the oil and gas produced therefrom, or the income derived from such oil or gas or from such leases or lands, cannot subject the same to such tax or taxation, and that the same, including the income therefrom, are and cannot be made subject to any taxation, direct or indirect, imposed or attempted to be imposed by the statutes of the State of Oklahoma, and that any such taxes are opposed to and in violation and contravention of the constitution and laws of the United States and of the treaties and agreements with the Indians, and of the constitution of the State of Oklahoma.

It is further alleged and shown by the supplementary returns that the defendant at all times has been, is now and will in the future be, the agent or instrumentality of the United States Government and of such Indians, and a means employed by the Congress of the United States to carry in to effect the powers conferred upon it by the constitution of the United States, and engaged in an occupation as and of such agent of such Government,

and of such Indian wards, and that there was granted to the defendant, and he has since been, and is now, exercising and will continue to exercise privileges and licenses and franchises so granted to him by the United States, as such agent, instrumentality or means.

It is further alleged and claimed by the supplementary returns that any tax imposed upon income derived from such leases upon such restricted Indian lands, and claimed to be exempt, would be and is a tax upon instrumentalities or means employed by the Congress of the United States to carry into effect the powers conferred upon it by the Constitution of the United States, and would be and is a tax upon a privilege or occupation executed through an instrumentality of the United States, and a tax upon the license or franchise granted by the United States, and a tax upon an agent of the United States Government and his occupation as such, and a tax upon the income from property, when the property itself is exempt, by reason of the constitution and laws of the United States, from taxation by the State of Oklahoma; and further, a tax substantially in effect upon the lease and property from which the income is derived, the same being exempt from taxation by the State of Oklahoma, and a tax indirectly imposed by the State of Oklahoma when it could not directly impose such a tax, and a tax upon the powers and operations of the Government of the United States, and a tax upon the property of the United States, or property held in trust by it for its Indian wards, and that the statutes involved, if construed to tax such income, would be and are opposed to and in

contravention and violation of the constitution, laws, treaties and agreements of the United States, and the constitution of the State of Oklahoma.

It is further alleged and shown by the supplementary returns that unless the income derived from or by reason of the leases on such restricted Indian lands and from the oil and gas thereon and thereby produced, shall be included as a part of the taxable income of the defendant for each of the years, respectively, then no further or other taxes are, or can be, made to appear, as now, or ever having been, assessable or rightfully to be levied on said income of the defendant for each of the years, respectively named, and the defendant in each of the supplementary returns makes a claim of exemption upon the grounds hereinbefore set forth and contained in each of the supplementary returns.

The State Auditor accepted these supplementary returns as correctly setting forth the income of the defendant in error for each of the years, respectively, and also the deductions therein set forth as properly allowable. There is, therefore, no dispute as to either the amount of the gross income, or the particular items composing the same, and no dispute as to the deductions allowed, but the entire case passed to the District Court, with these facts undisputed, and was so decided by the learned judge of that court.

Upon filing the supplementary returns, the State Auditor accepted them as correctly setting forth the items of income and the items of deduction, and also as correctly setting forth the claims of exemption for each of the

years. The returns show, and it is conceded that, unless the income from these departmental leases on restricted Indian lands, is properly taxable by the State of Oklahoma, the defendant and taxpayer has returned all, and in some instances ^{more than the amount} have returned and paid taxes upon; and, unless such income can properly be included and taxed, then the State of Oklahoma has, and can have, no claim for any additional taxes on the income of the defendant and taxpayer for any of the years involved in this controversy.

After the filing of the Supplemental Returns, on February 6th, 1920, there was had a hearing before the State Auditor, and he found that each of these Supplemental Returns correctly set forth the items of income from such leases, and the deductions to be allowed, in the event taxable, and that such leases were made and executed in pursuance of the Acts of Congress, and treaties and agreements with the Indians, and the rules and regulations promulgated and prescribed by the Secretary of the Interior, or Department of the Interior, and were operated under such rules and regulations, and the supervision of the Secretary of the Interior, but denied the claim of exemption from taxation by the State of Oklahoma, and assessed and levied the payment of the taxes and the penalties thereunder. (Printed Record, pages 55 to 62, inclusive.)

Regular and proper steps were taken by the defendant for an appeal to the District Court of Oklahoma County, Oklahoma, under the Statutes of Oklahoma, and the case

was lodged in that Court in accordance with such Statutes. (Printed Record, pages 60 to 64, inclusive.)

Thereafter, on the 16th day of April, A. D. 1920, a regular trial of the cause having been had, on the demurrer to the Supplemental Returns, filed by the State of Oklahoma, the District Court overruled the demurrer, and, the State electing to stand on the demurrer, the District Court found all the issues in favor of the defendant, as such taxpayer, and found that the assessment of the taxes, and on each item thereof, as shown by the several Supplemental Returns made and filed by the defendant, was illegal and void, and that the income so taxed was and is exempt from taxation under the Laws and Acts of Congress, and the attempted collection thereof in violation of the Constitution of the United States, and the action of the Auditor of the State of Oklahoma assessing, levying and enforcing the payment of such additional taxes on the income of petitioner, derived from such leases, was annulled, set aside and canceled by the Judgment or Decree of the District Court. (Printed Record, pages 65 to 66, inclusive.)

The plaintiff, the State of Oklahoma, appealed from the Judgment or Decree of the District Court to the Supreme Court of Oklahoma, where, after a full presentation on oral arguments and briefs, on the 14th day of December, A. D. 1920, in an opinion by Justice Kane, the Judgment of the Trial Court was affirmed. (Printed Record, pages 68 to 72, inclusive.)

Mr. Justice Kane so aptly and concisely states the issues presented to the Supreme Court of Oklahoma, that

his short, but incisive, opinion, will better state the facts than counsel could, and is not only a complete demonstration of the impregnable position, which the defendant holds on the merits of the case, but also, when considered in connection with the arbitrary reversal of his opinion by the Supreme Court of Oklahoma, after the personnel of the court had been changed, conclusively establishes the right of the petitioner to his writ, in the event this Court should hold this case should be lifted from the Supreme Court of Oklahoma to this court by Certiorari.

Mr. Justice Kane said:

This is an appeal from an order of the District Court of Oklahoma County **exempting the defendant in error from paying taxes upon income accruing from the sale of oil produced from departmental leases on restricted Indian lands.** Inasmuch as there is no disagreement between the parties as to the facts nor as to the question of law arising therefrom, no detailed statement of the record made below is necessary in order to pass upon the only question presented for review. The parties agree that the Attorney General correctly states the question of law at issue in this brief as follows:

"The only question presented other than the one of penalties is whether or not the state is prevented from collecting income tax from leases on Indian lands **under the supervision and approval of the Secretary of the Interior upon the same considerations which led the court to deny that right to the state in what is known as the gross production tax cases, to-wit: Choctaw & Gulf R. Co., v. Harrison, 235 U. S. 292, 59 L. Ed. 234; Howard v. Gypsy Oil Co., 257 U. S. 504, 62 L. Ed. 1239; Large Oil Co. v. Howard, 248 U. S. 549, 63 L. Ed. 416.**"

As it is agreed between counsel that under the cases just cited it is settled law that oil and gas leases of lands in Oklahoma made by or on behalf of restricted Indians under the authority of an Act of Congress **are under the protection of the Federal Government and that the lessees are Federal agencies in whose hands the leases cannot be taxed either directly or vicariously**, it will not be necessary to notice any of the aspects of the case at bar except those which the Attorney General contends **distinguish it from the cases cited.**

Conceding the non-taxability of the source of the income sought to be taxed, viz., the oil and gas leases, the Attorney General argues that, keeping in mind the proper conception of the income taxation, it cannot be said that because such income was derived from the sale of oil and gas, which oil and gas was derived from restricted Indian lands, such income is exempt from taxation on the ground that constituted an unlawful burden upon a Federal Agency or instrumentality. The income sought to be taxed says the Attorney General, "is net income determined after close of the preceding year's business after it has been determined that, less all expenses and necessary expenditures of every nature, there still remains in the hands of the taxpayer a net income. This net income so remaining is the thing that is taxed and its taxation cannot possibly amount to a burden upon the exercise of a Federal Agency."

In this connection the Attorney General also contends that the 16th Amendment to the Constitution of the United States had **for its sole purpose the separation of income from its source for the purpose of taxation**, and, therefore, the ruling in *Pollock v. Union Trust Co.*, 157 U. S. 429, and 158 U. S. 601, cited by counsel for the appellant, to the

effect that **when the property itself cannot be taxed by a state then the income derived from that property or source is equally exempt from the tax**, is no longer applicable. In disposing of this last contention, first, it is sufficient to say **that the 16th Amendment does not purport to confer additional power or authority on the states**, but is confined exclusively to granting power to Congress to lay and collect taxes on incomes from whatever source derived without apportionment among the several states, and without regard to any census enumeration. Aside from the necessity of apportionment of income taxes imposed by Congress, **from sources that would be direct or capitation taxes**, the taxing powers of the United States **and the States** are the same as before the adoption of the Amendment, **and not a single restriction or limitation imposed upon the State by the Constitution of the United States has been removed**. In other words, the 16th Amendment was not adopted to confer upon Congress the power which it already had to tax incomes, but simply to relieve it from necessity of apportioning such taxes among the several States, when such income should be derived from either real estate or personal property, since the doctrine then was, and now is, that such income tax was a direct tax, because, in effect, **a tax upon the source of the income**.

The case, therefore, of *Pollock v. Union Trust Co.*, *supra* has not been modified by the Amendment except as to the requirement of apportionment of taxes derived from real estate and personal property. The natural and correct meaning of the act is the same as that case declared and merely the rule of apportionment has been abrogated. This being true, **the powers of the State in the matter of taxing incomes derived from these leases by a Federal Agency is not affected**. Every limitation or restriction imposed by the Constitution upon the

State remains absolutely unabated and without change. As was held in *Brushber v. Union Pacific R. R. Co.*, 240 U. S. 1, 60 L. Ed. 493, the purpose of the Amendment was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the source from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source of the income itself, and thereby to take an income tax out of the class of excise, duties and imports and place it in the class of direct taxes.

In *Pollock v. Union Trust Co.*, *supra*, in which certain income tax laws enacted by Congress prior to and leading up to the 16th Amendment were held invalid, the court clearly holds that **when the property itself cannot be taxed by the Federal Government or by a State, the income derived from that property or source is equally exempt from the imposition of the tax.** Having reached the conclusion that the power of the State in the matter of taxing the income accruing to the lessees from these departmental oil and gas leases is not affected by the 16th Amendment, **it is impossible to distinguish the case at bar from the cases first cited, and particularly from Large Oil Co. v. Howard, supra.**

In the Large Oil Co., case the Act of the Legislature of May 14, 1916, commonly known as the Gross Production Tax Law was under consideration. The tax was assailed on two grounds. First, as an attempt to levy a privilege or occupation tax and therefore invalid **as to oil and gas produced through the operation of a Federal Agency**, and second, that the oil and gas contained or secured from lands of **the Osage Nation is exempt from the imposition of the tax.** This court clearly stated the principles **exempting the subject-matter in-**

volved from the operation of the State law, but following the **contention of the Attorney General**, unheld the law on the theory that the Act imposed **a property tax**, and in this respect the case was distinguishable from *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison, supra*, wherein the Supreme Court held that the Act of the Legislature of 1908 was invalid because it attempted to impose an occupation or privilege tax upon a Federal Agency. The Supreme Court of the United States, **without noticing this distinction**, reversed the case in a memorandum opinion upon the authority of *Choctaw & Gulf Ry. Co. v. Harrison, supra*, and the other cases hereinbefore cited.

As we believe **those cases are controlling** on the question now under consideration, it follows that the judgment of the court below **must be affirmed**.

This opinion, by the learned Justice, still on the bench of the Supreme Court of Oklahoma, and dissenting from the opinion and decision now under review, tells in graphic language the view entertained by the learned District Judge, and the Supreme Court of Oklahoma up to this time.

Thereafter, on December 28th, A. D. 1920, on the eve of several of the Justices, who had concurred with Justice Kane, leaving the bench, on account of the recent election held, the Attorney General filed a petition for rehearing. (Printed Record, pages 72 to 73, inclusive.)

On April 5th, A. D., 1921, without ever granting a new hearing, and receiving argument before the Court as newly constituted, the court reversed the former opinion, delivered by Justice Kane, heretofore set forth, and, under the leadership of Chief Justice Harrison, who had be-

come such on the reorganization of the Court, rendered a judgment, and delivered an opinion by him, thus reversing this former opinion, the learned Chief Justice basing his holding in this case on an opinion, which he had rendered, in the case of *In re Skelton Lead & Zinc Company's Gross Production Tax for the Year 1919*, 197 Pac. Rep. 495, taking the remarkable position that the "Gross Production Tax," imposed by the Act of 1916, by the Legislature of Oklahoma, is a "property tax," purely in lieu of all other taxes, and that, as this Court handed down merely a memorandum opinion in *Large Oil Co. v. Howard*, *supra*, and, although having before it the same Act of 1916, as the learned Chief Justice then knew, or should have remembered (as in that case representing the State of Oklahoma as Assistant Attorney General), held, it must be presumed this Court had the old Act in view, or some similar Act, and not that of 1916. The learned Chief Justice, therefore, by means of this legerdemain held that, while a property tax could not be imposed upon the lease themselves, it could be imposed upon the income derived therefrom.

We have, therefore, two decisions of the courts in favor of the defendant, the taxpayer, and one decision in favor of the plaintiff, the state.

After a full hearing, and upon oral arguments and full briefs, the District Court of Oklahoma found the issues, and rendered judgment, in favor of the defendant, on the ground that the Income Tax Statutes of the State of Oklahoma, as applied to the income involved, derived

solely from these leases on restricted Indian lands, were repugnant to, and in violation and contravention of, the Constitution of the United States.

Upon appeal by the State of Oklahoma to its own Supreme Court, that Court, in its first opinion, and before the change in the personnel of the court, with experienced justices sitting on the bench, who were shortly thereafter required to leave the court on account of failure of re-election, affirmed the judgment of the Trial Court, for the same reasons, and on the same grounds, as the District Court rested its findings. Of the justices hearing the case, none dissented from the decision then rendered.

Thereafter, and after a change in the personnel of the Court, experienced judges leaving, and new and inexperienced judges arriving, without even granting a rehearing, and allowing further oral arguments, the Supreme Court of Oklahoma, under the leadership of its new Chief Justice, reversed its first decision, and the judgment of the Trial Court.

The Statutes of Oklahoma involved, of course, are the Income Tax Statutes of that State. In view of the record, and the agreement of the parties as to the facts, this Court will probably care but little about the text of the statutes imposing the taxes involved. In order, however, that the court may have the main provisions of the Statutes, we will, in this connection, call them to the attention of the Court.

Section 12, of Article 10 of the Constitution of Oklahoma, provides as follows:

The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, **income**, collateral and direct inheritance, legacy, and succession taxes; also **graduated income taxes**, graduated legacy and succession taxes; also stamp, registration, production or other specific taxes.

Section 1, of the Act of the Legislature, approved March 17, 1915, Session Laws, 1915, beginning on page 232, provides as follows:

Each and every person of this state shall be liable to an annual tax upon the **entire net income arising from all sources** during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this state by persons residing elsewhere.

Section 5, of the same Act, provides, among other things, as follows:

The term "income" as used in this Act, shall include:

(a) All rentals derived from real estate or any interests thereunder of a potential duration of two years or more.

* * * * *

(e) All royalties derived from the possession or use of franchise or legalized privileges of any kind.

(f) **All other income of any kind derived from any source whatsoever**, except such as is exempt from taxation by some law of the United States or of this state.

While we can now conceive of no reason why this Court should desire to have the full text of the Statutes of Oklahoma covering incomes, yet, in anticipation of the fact that the Court may desire to examine them as a whole, we are, for the convenience of the Court, setting forth and printing them in an Appendix to this brief, where the Court may have the full text of all the Statutes, if it should desire to examine the same.

While two propositions were before the Supreme Court of Oklahoma, there is really but one question before this Court, and to be presented to this Court, and that is as to whether or not the State of Oklahoma has any authority whatever to assess, levy and collect income taxes on the income involved, derived solely from leases on these restricted Indian lands, and with the restrictions that necessarily inhere in such leases.

The case, therefore, is now before this Court for review of the final decision and opinion of the Supreme Court of Oklahoma, rendered, delivered and handed down in the face of the judgment or decree of the Trial Court, the District Court of Oklahoma County, Oklahoma, and in face of the first decision and opinion of the Supreme Court of Oklahoma, and all parties have co-operated in order to get a speedy and final decision by this Court, the one which must ultimately and finally decide the issues involved. The State Auditor of Oklahoma, the Attorney-General, the learned District Judge trying and deciding the case in favor of the defendant below, and all, have combined to speed the case, and this Court has heartily joined in the same good purpose by advancing this case, to

the end that it may be determined whether or not income from Departmental leases on restricted Indian lands of the character involved, and with the restrictions existing as admitted, can be taxed under the Income Statutes of the State of Oklahoma.

It is the contention of the defendant that no such taxes can be assessed, levied and collected, and that any attempt to apply the Statutes of Oklahoma to, and collect taxes on, the income involved, would be repugnant to, and in violation and contravention of, the Constitution of the United States, and the Statutes and Treaties made in pursuance thereof.

SPECIFICATION OR ASSIGNMENT OF ERRORS.

1. The Supreme Court of Oklahoma erred in holding, deciding and determining that Acts or Statutes of Oklahoma March 17th, 1915, Session Laws of Oklahoma, 1915, 232, as amended by the Act of March 2nd, 1917, Session Laws of Oklahoma, 1917, 227, imposing income taxes, are valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, Treaties and Laws of the United States.

2. The Supreme Court of Oklahoma erred in holding, deciding and determining that the acts of the Auditor of the State of Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by the Acts or Statutes mentioned in Specification or Assignment 1 preceding, are and were valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, Treaties and Laws of the United States.

3. The Supreme Court of Oklahoma erred in sustaining the validity of the income taxes imposed by the State of Oklahoma upon income of the defendant derived solely from oil and gas leases upon restricted Indian lands, subject to the control of Congress.

4. The Supreme Court of Oklahoma erred in reversing the judgment or decree of the District Court of Oklahoma County, Oklahoma.

BRIEF AND ARGUMENT.

I.

The leases involved, and the defendant as the lessee, are instrumentalities and agencies of the Government of the United States, through which it is discharging its duty to the Indians, and exercising its governmental powers and functions, and are instruments and means employed by Congress to carry into effect the powers conferred upon it by the Federal Constitution.

We deem it really unnecessary to cite authorities to this Court, demonstrating that the leases involved, and the defendant as the lessee, are instrumentalities and agencies of the Federal Government, through which it is discharging its duty to the Indians, and exercising its governmental powers and functions, and that they are instruments and means employed by Congress to carry into effect the powers conferred upon it by our Federal Constitution. We are briefly doing so more for the convenience of the Court, if it should desire to review some of the cases conclusively establishing this proposition.

In **Railroad Co. v. Harrison**, 235 U. S. 292, where there were leases on coal lands belonging to the Choctaw and Chickasaw Indians, two Nations of the Five Civilized Tribes, similar to the ones now involved, this Court settled the proposition, saying on page 298:

From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and **appellant is the instrumentality through which this obligation is being carried into effect.** Such an agency cannot be subjected to an occupation or privilege tax.

In Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, oil and gas mining leases on the lands of the Osages, in exactly the same situation as the ones now involved, the doctrine of the Harrison Case, *supra*, was applied to the Osage leases, this Court, referring to the attempt of the Supreme Court of Oklahoma to indirectly tax the lease by reaching the stock of the Corporation, saying on page 529:

Whether the Constitution of the State permits this accommodation, we are not called upon to say. We are clear ^{to exempt the Corporation} to relieve from the restraints upon the power of the State to tax property under the protection of the United States. **That the leases have the immunity of such protection we have so decided.**

In Howard v. Gypsy Oil Co., 247 U. S. 504, (No. 245, October Term, 1918) leases of exactly the same character as those now involved were under consideration by this Court, and the judgment of the Court below in favor of the lessee was affirmed in a memorandum opinion upon the authority of the two preceding cases. One of the Creek County leases involved is the identical lease now involved,

the defendant in this case owning that lease with the Gypsy Oil Company, being what is known as the Jackson Barnett lease. This is shown on page 26 of the Printed Record in that case, where the name is given as J. Barnett, and is first shown on page 16 of the Printed Record in the case at bar.

In **Large Oil Co. v. Howard**, 248 U. S. 549, there were involved Osage leases identically like and in same situation as the ones in the case at bar, and this case was affirmed by a memorandum opinion upon the authority of the preceding cases.

In **Large Oil Co. v. Howard**, 63 Okla. 143, reversed in the preceding case by this court, the Supreme Court of Oklahoma recognized the true character of these leases, and the agency of the lessees, but refused to apply the law applicable, as determined by this court.

The Supreme Court of Oklahoma, beginning on page 144, said:

It must be received as a postulate that the means or agencies provided and selected by the Federal Government, as necessary or convenient to the exercise of its functions, **cannot be subjected to the taxing power of the State.** *

It is not open to question that the plaintiff in error and a large number of oil producers in this state, alike situated, **are deemed to be considered in the discharge of the functions imposed upon them by the General**

Government as a Federal agent or instrumentality, through which the Government discharges its duty to a considerable class of Indians, including the Osage Indians.

In the case of **In Re Gross Production Tax of Wolverine Oil Co.**, 53 Okla. 24, the Supreme Court of Oklahoma again recognizes the underlying doctrine, and, with reference to the status of oil and gas mining lease on the lands of the Osage Nation and of the members of the Five Civilized Tribes, all of which are included in the case at bar, on page 37, said:

In leasing the lands of the Osage Nation for oil and gas, as well as making such leases on restricted lands of certain of the allottees of the Five Civilized Tribes, the Department of the Interior, acting pursuant to lawful authority, has in behalf of these Indians, whom Congress has regarded as dependent, and in need of the Government's protection, **assumed full and complete jurisdiction and control during the period of dependency.** This form of general guardianship is exercised because of the **duty owing these dependent people**, that the vast oil and gas deposits on their lands **may be developed and marketed**, and those lawfully entitled thereto given the benefit thereof. As was said in the **Harrison Case**, the **instrumentalities made use of by the general Government are the lessees of such or their duly authorized assignees.** More need not be said in this connection, for the question is foreclosed in the **Harrison Case.**

There is, and can, therefore, be no question as to the position occupied both by the leases and the lessees in those of this character. We start, therefore, with the fundamental proposition that the State of Oklahoma, in attempting to impose the income taxes involved is dealing with instrumentalities and agencies of the Government of the United States itself, and that, to sustain the taxes involved, the State must show some way, which has never heretofore been found, by which it can either directly or indirectly impose **any tax** whatever upon such.

II.

The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control or affect, in the slightest degree, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Government of the United States, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution, and any tax imposed, or any attempt to impose a tax, therefor or thereon, however slight or insensible its effect may be, or no appreciable effect appearing, is repugnant to the Constitution of the United States. The State is absolutely without authority to so tax.

Before passing to the decisions and authorities, which most directly and intimately bear upon the instant case, we desire to first examine some of the fundamental and leading decisions of this Court, fully sustaining our positions. An examination of a few of these leading cases, marking the division between the States and the United States, will reinforce every decision we have so far cited, and which we shall hereafter call to the attention of the Court, and will demonstrate that, from the very first and foundation, there has been a complete and absolute want of power in the States to affect or touch, in the slightest degree, the subject-matter now sought to be taxed.

There are zones and spheres occupied by the United States into which the States cannot enter with taxation, as there are like zones and spheres

occupied by the States into which the United States cannot enter with taxation. These oil and gas leases, and the income derived therefrom, net or gross, are within the exclusive zones or spheres of the United States, and cannot be touched, directly or indirectly, closely or remotely, by taxation by the States. The State is absolutely without power to enter this field of taxation. It must keep hands off. It is not a question as to the degree, which the tax may affect the subject-matter; for, on this subject-matter, the State cannot impose any tax whatever. The State cannot step beyond the border line; it cannot impose any tax whatever, and it is bereft of all authority to impose any tax whatsoever. There is no shadow line, in which the United States and the States can enter in common, but, on one side of the line, the United States Government stands supreme, and the States cannot cross the boundary line.

We again feel that we are citing to this Court authorities probably unnecessary to call to its attention, and we are doing so more from the abundance of caution than any feeling that the Court may need these cases to be called to its attention, and more for its convenience in having them ready for hasty review, if it should desire to refer to them.

In determining the question as to whether or not the State has entered the forbidden sphere or zone, the name of the tax, or its character, as determined by the laws of the State, is of no conse-

quence. Its real nature and effect will govern in determining whether or not it falls within the constitutional inhibition. Also, if the **source** cannot be taxed, then the **income** derived from that source is exempt from taxation.

This Court has always held that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control or affect, in any possible way the operations of the constitutional laws enacted by Congress to carry into execution the power vested in the general Government, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor the means employed by Congress to carry into effect the powers conferred by the Federal Constitution. This Court has also always held that any tax, however slight its sensible effect may be, or even if having no appreciable effect, when it touches the operations of the laws enacted by Congress, or the instrumentalities and agencies of the Federal Government, or any of the means employed by Congress to carry into effect the powers conferred upon it by the Federal Constitution, whatever may be its effect, whether close or remote, direct or indirect, slight or great, sensible or insensible, is repugnant to the Constitution of the United States. It may be fair and just, but it cannot exist; for the State is absolutely without any power to impose such a tax.

In **McCulloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, one of the most celebrated in our judi-

cial history, Chief Justice Marshall, early stated the underlying doctrines which have threaded through all the cases we have cited, and which we shall hereafter cite, and which are still the law. This case was an attempt by the State of Maryland to require a branch of the bank established under and by authority of Congress, to pay certain stamp taxes on notes issued by such branch of the bank.

Chief Justice Marshall said, on page 405:

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the Government of the United States, though limited in its powers, is **supreme within its sphere of action**. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, “this constitution, and the laws of the United States, which shall be made in pursuance thereof,” “shall be the supreme law of the land,” and by requiring that the members of the state legislature, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

The Government of the United States then, though limited in its powers, is **supreme**; and its laws, when made in pursuance of the con-

stitution, form the "supreme law of the land," anything in the constitution and laws of any state to the contrary notwithstanding.

Leading up to the discussion of the power of the State of Maryland to impose the taxes involved, the learned Chief Justice, beginning on page 425, said:

That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the Government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But, **such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted.** The states are forbidden to lay any duties or imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the **same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power,** and in its nature is incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of the state to tax its operations. There is no express provision for the case, but the claim has been sustained on principle which so entirely pervades the constitution and the laws made

in pursuance thereof, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

The great principle is, that **the constitution and the laws made in pursuance thereof are supreme**; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which and on their application to this case, the cause has been supposed to depend. These are; 1st. That **a power to create implies a power to preserve**. 2nd. That **a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and preserve**. 3rd. That where this repugnancy exists, **that authority which is supreme must control**, not yield to, that over which it is supreme. The court further said, beginning on page 427:

That the power of taxing by the states may be exercised **so as to destroy it**, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limitation than those expressly prescribed in the constitution, and like sovereign power of every description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the state, in the article of taxation itself, **is subordinate to, and may be controlled by, the constitution of the United States**. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared can be admissible, **which would defeat the legitimate operations of a supreme government**. It is of the very

essence of supremacy **to remove all obstacles to its action within its own sphere**, and to **so modify** every power vested in subordinate governments as to **exempt its own operations** from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

Referring to the contention of the state that, while it might not directly resist a law of Congress, it might exercise its acknowledged power upon it, in confidence that the state would not abuse it, the Court further said, beginning on page 428:

The people of a state, therefore, give to their Government the right of taxing themselves and their property, and as the exigencies of the Government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative to guard them against its abuse. But the means employed by the Government of the Union have no such security, nor is the right of the state to tax them sustained by the same theory. These means are not given by the people of a particular state but by all the people of all the states. They are given by all, for the benefit of all—and upon theory, **should be subjected to that government only which belongs to all.**

The Court further said:

The sovereignty of the state extends to everything which exists by its own authority,

or is introduced by its permission; but does it extend to those means **which are employed by Congress to carry into execution—powers conferred upon that body by the people of the United States?** We think it demonstrable that it does not. Those powers are not given by a people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of the sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which will leave the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and **which places beyond its reach all these powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution.** We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is the right in another to preserve. We are not driven to the perplexing inquiry, so unfit for a judicial department, what degree of taxation is the legitimate use, and what degree may amount

to the abuse of power. **The attempt to use it on the means employed by the Government of the Union in pursuance of the constitution, is itself an abuse,** because it is the usurpation of a power which the people of a single state cannot give.

We find then, on just theory, **a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers.** The right never existed, and the question whether it has been surrendered, cannot arise.

That the power to tax involves the power to destroy; **that the power to destroy may defeat and render useless the power to create;** that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not—why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided the most important and most valuable interests? In the legislature of the Union alone, are all represent-

ed. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; by this principle would transfer the supremacy—in fact, to the states.

“If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states.

Gentlemen say they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the Constitution; that, with respect to everything else, the power

of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. This is not the only mode in which it might be displayed—the question is, in truth, **a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.**

The Court concluded as follows:

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that **the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.** This is, we think, the unavoidable consequence of that **supremacy** which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real

property of the bank, in common with other real property within the state, nor to tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. **But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution.** Such a tax must be unconstitutional.

This great case is really decisive of every issue in the case at bar. The principles enunciated, and the doctrines declared, lead to the inevitable conclusion that the income taxes, which the auditor of the State of Oklahoma is seeking to assess and collect against the defendant in error, cannot be sustained for the reason that the State of Oklahoma is absolutely without any power to exercise its taxing powers, broad and comprehensive as they are, against or upon this object of taxation.

The power of the Federal Government to borrow money is no more clearly bestowed by the constitution, than is its power and duty to make the contracts for the exploitation and development of these oil and gas lands of the Indians, and its power to establish a bank is no more clearly granted by that same constitution, than it is to make these contracts with the lessees for discharging its own and governmental duty and obligation to the Indian wards, which it represents. To allow the State to

directly or indirectly tax these leases, either vicariously, or by reaching the income therefrom, would be clearly to allow the State to exercise a power by taxation **"to retard, impede, burden or control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."** On a consideration of this, and the other authorities which we have cited, and shall hereafter cite, we must conclude in the language of this great case, pristine in its strength now as when the opinion was first delivered, there is **"a total failure of this original right to tax the means employed by the Government of the Union, for the execution of its powers."**

In **Weston v. Charleston**, 2 Pet. 449, 7 L. Ed. 481, there was an attempt by the city to levy a tax upon the interest of stocks issued by the Federal Government as evidence of indebtedness.

The Court, on page 465, said:

Congress has power **"to borrow money on the credit of the United States."** The stock it issues is the evidence of a debt created by the exercise of this power. **The tax in question is a tax upon the contract subsisting between the Government and the individual.** It bears directly upon the contract, while subsisting and in full force. **The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.**

If the states and corporation throughout the Union, possess the power to tax a contract

for the loan of money, what shall arrest this principle in its application to every other contract?

Answering the question propounded, the court said:

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which interests certainly, perhaps the liberty of the whole may depend; may be burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

In a society formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes, in many respects independent, and in the uncontrolled exercise of many important powers, occasional interference ought not to surprise us. The power of taxation is one of the most important to a state, and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise, is undoubtedly among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it, we have considered it as a necessary consequence from the supremacy of the government

of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of the state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the states, united, may adopt.

After quoting from, and giving a strong affirmation of, **M'Culloch case, supra**, the Court further said:

We retain the opinions which we then expressed. **A contract made by the Government in the exercise of its powers, to borrow on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends the money may reside, and is undoubtedly an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of **M'Culloch v. The State of Maryland**, to be exempt from state taxation, and consequently from being taxed by corporations deriving their powers from states.**

It is admitted that the power of the Government to borrow money **cannot be directly opposed**, and that any law **directly obstructing its operation would be void**; but a distinction is taken **between direct opposition and those measures which may consequentially affect it**; that is, a law prohibiting loans to the United States would be void, but that **a tax on them to any amount is allowable.**

It is, we think, impossible not to conceive the **intimate connection** which exists between these two modes of **acting on the subject.**

It is not the want of original power in an independent sovereign state to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their Government, and by making that Government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of the influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

In **Brown v. Maryland**, 12 Wheat. 419, 6 L. Ed. 678, an Act of the State of Maryland, requiring all importers of foreign goods to take out a license, and imposing for selling without such license, was held invalid, notwithstanding the state had otherwise plenary power to tax occupations.

The Court, beginning on page 439, said:

It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition.

Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax be levied in this form by the state, it may be levied to any extent which will defeat the revenue by impost, so far as it is drawn by importations into the particular state. We are told that such **wild and irrational abuse of power** is not to be apprehended, and is not to be taken into view when discussing its existence. **All power may be abused**; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. **But we do not place the question on that ground.**

These arguments apply with the same force against the **whole prohibition**. It might, with the same reason be said that no state would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought **this power is one which no state ought to exercise.** ?

The Court further said, beginning on page 444:

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowl-

edged to reside in the states, to that dangerous extent which the counsel for the defendant in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the states from doing that which the great object of the constitution was to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, **but on the person**. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is **varying the form, without varying the substance**. It is treating a prohibition as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a **tax on the sale** of an article, imported only for sale, is a **tax on the article itself**.

In **People v. Commissioners**, 2 Black 620, 17 L. Ed. 451, there is found a full exposition of the principles now under consideration. In that case, it was held that the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the laws of New York, was not subject to taxation by the State.

The Court stated the proposition as follows:

The question involved in this case is whether or not the stock of the United States, constituting a part of the whole of the capital stock of a bank organized under the banking laws of New York, is subject to state taxation. The capital stock of the bank is taxed under existing laws in that State upon the valuation

like the property of individual citizens, and not as formerly on the amount of the nominal capital, without loss or depreciation.

Noting, and disposing of, a distinction between this case and **Weston v. Charleston**, *supra*, the Court further said:

It has been argued, however, that the form or mode of levying the tax under the Ordinance of the City of Charleston, was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in circumstances that the tax in the former case was imposed on the stock *eo nomine*, whereas in the present it is taxed in the aggregate of the taxpayers' property; and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded as any other security for money or chose in action.

It is true the ordinance imposing the tax in the case of **Weston v. City of Charleston**, did discriminate between the stock of the United States and other property—that is, the ordinance did not purport to impose a tax upon the property owned by the taxpayers of the City and especially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*.

But does this distinction put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock

of the United States from the other property of the tax payer cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the state, it **might be exercised to the destruction of the value of the stock and, consequently, of the power or function of the Federal Government to issue it for any practical * * * uses.**

It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded, or cannot be reached. The argument concedes that the Federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed. It is true that in many, if not in all the Constitutions of the States, provisions will be found confining the power of the Legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint upon the power imposed by the State itself. In the absence of any such restriction, discrimination in the tax would rest in the discretion of the Legislature. Whether regulated by the Constitution or by the Act of the Legislature, is a question of state policy, to be determined by the people in convention or by the Legislature. **In either case the power to discriminate or not is in the State.** How then can this limitation upon the taxing power of a State, which the argument assumes may be used to discriminate against the Federal stocks, be enforced? The power to enforce it must be **independent of the State** to be effectual. There

can be but one answer to this question, and that is: by the supreme judicial tribunal of the Union. But is this court a fit tribunal to sit in judgment upon the question whether the Legislature of a State has exercised its taxing power wisely or unwisely over objects of taxation confessedly, as the argument assumes, within its discretion?

And is the question a judicial question? We think not. There is and must always be a considerable latitude of discretion in every wise government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions and the like, are examples. Can any court say that these are discriminations which, upon the argument that seeks to distinguish the present from the case of **Weston v. The City of Charleston**, would or would not take it out of that case? A court may appropriately determine whether property taxed was or was not **within** the taxing power, but if within, **not that the power has or has not been discreetly exercised**. We cannot, therefore, yield our assent to the soundness of the distinction taken by the counsel between this case and the one referred to.

Upon looking at the case of **Weston v. The City of Charleston**, it will be seen that the decision of a majority of the court was not at all placed upon the distinction we have been considering, but upon ground **much broader** and wholly independent of it.

The tax upon the stocks was regarded as a tax upon the **exercise of the power of Congress** "to borrow money on the credit of the United States." The exercise of this power was interfered with **to the extent of the tax** imposed by

the city authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The Chief Justice observes, that "if the right to impose a tax exists, it is a right which, in its nature, **acknowledges no limits.** It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe."

He then refers to the taxing power of the State, its importance, and extensive operation, and the delicacy and difficulty of fixing any limit to its exercise; and that in the performance of this duty, which had, in other cases, devolved on the court, it was considered as a necessary consequence of the supremacy of the Federal government that its action in the exercise of its legitimate powers **should be free and unembarrassed by any conflicting powers of the States,** and that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this Government may rightfully adopt.

He further observed, that "the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, **but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.** The attempt to use the power of taxation on the means employed by the Government of the Union in pursuance of the Constitution, **is itself an abuse,** because it is the usurpation of a power which the people of a single State cannot give," and the Chief Justice then adds, "a contract made by the government, in the exercise of its powers, to borrow

money on the credit of the United States, is undoubtedly **independent of the will of any State** in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created."

It is apparent in studying this opinion in connection with the opinions of the court in the cases of **McCulloch v. The State of Maryland**, 4 Wheat. 316, and of **Osborn v. The U. S. Bank**, 9 Wheat., 738, that it is but a corollary from the doctrines so ably expounded by the Chief Justice in the two previous cases in the interpretation of an analogous power in the Constitution. The doctrine maintained in those cases is, and the powers granted by the people of the States to the General Government and embodied in the Constitution, **are supreme within their scope and operation**, and that this government may exercise these powers in its appropriate departments, **free and unobstructed by any State legislation or authority**. That within this limit this government is sovereign and independent; and **any interference** by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in **conflict with that clause of the Constitution** which makes the Constitution and the Laws of the United States passed in pursuance thereof "the supreme law of the land."

The result of this doctrine is, that **the exercise of any authority by a state government** trenching upon any of the powers granted to the General Government, is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if **the encroachment or usurpation to any extent is admitted**, the principle involved would carry the exercise of the authority of the

State to any indefinite limit, even to the **destruction of the power**. For, as truly said by the Chief Justice in the case of **Weston v. The City of Charleston**, in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit; it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

An illustration of this principle in respect to the powers of the Judicial Department of this government, is found in the case of **The United States v. Peters**, 5 Cranch. 115. There the Legislature of the State of Pennsylvania attempted to annul the judgment of a court of the United States, and destroy all rights acquired under it. It was quite apparent, if the principle involved might annihilate the whole power of the Federal Judiciary within the State. The Act of the Legislature did not profess to exercise this power generally, but only in the particular case, on the ground that the court had no jurisdiction. But the Chief Justice, in giving the opinion of the court, very naturally observes, that the right to determine the jurisdiction of the courts was not placed by the Constitution in the State Legislatures, but in the supreme judicial tribunal of the nation. If time allowed, many other cases might be referred to, illustrating the principle in respect to other departments of this government.

The conclusive answer to the **attempted exercise of state authority** in all these cases is, that the exercise is in derogation of the powers granted to the **General Government**, within which it is admitted it is supreme. That government whose powers, executive, legislative or judicial, whether it is a government of enumer-

ated powers like this one or not, **are subject to the control of another distinct Government**, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to **constant interruption and possible annihilation**. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the General Government; and its exercise, a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government **may tax it at discretion**? It is apparent that the power, function or means, however important and vital, **are at the mercy of that government**. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, "It is a right which in its nature acknowledges no limits." And the principle is equally true in respect to **every other power or function** of a government subject to the control of another.

In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, State and Federal. The Chief Justice in **McCulloch v. The State of Maryland**, 4 Wheat. 316, endeavored to fix this boundary upon the subject of taxation. He observed, "If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a

principle which leaves the power of taxing the people and property unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union."

All will agree that this is the enunciation of a true principle, and it is only by wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to anyone of the great departments of government. When the limit is ascertained and fixed, all perplexity and confusion disappear. **Each is sovereign and independent in its sphere of action, and, exempt from the interference or control of the other,** either in the means employed or functions exercised and, influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared.

In **Van Brocklin v. Anderson**, 117 U. S. 151, 29 L. Ed. 845, in which this Court denied the right of the State to tax lands within its territory, which had been acquired by the United States through sales for direct taxes, the underlying principles are well stated, the Court saying:

While the power of taxation is one of vital importance, retained by the States, not

abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a State is subordinate to and may be controlled by the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective States and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the **means employed by the government of the Union** are not given by the people of a particular State, but by the people of all the States; and, being given by all for the benefit of all, **should be subjected to that government only which belongs to all.** All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles **exempt from taxation.** The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. **The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse,** because it is the usurpation of a power which the people of a single State cannot give. **The power to tax involves the power to destroy;** the power to destroy may defeat and **render useless the power to create;** and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the con-

trol. The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.

In *California v. Railroad Co.*, 127 U. S. 1, 32 L. Ed. 150, the State Board of Equalization of California included in its assessment all the franchises of the Railroad Company, among which were franchises granted by the United States, conferring upon the company the right to construct its road across the State and across the Territories of the United States, and of taking toll thereon, and this Court held that the franchises conferred by Congress could not be taxed by the State.

Stating the underlying principles exactly fitting the case at bar, this Court said:

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 17 U. S. 4 Wheat, 316 [4:579], "the power to tax involves the power to destroy." Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be

subjected to taxation by a State. The power conferred emanates from, and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but **subversive of the powers**, of the Government, and repugnant to its **paramount sovereignty**. It is unnecessary to cite cases on this subject. The principles laid down by this court in **McCulloch v. Maryland**, *supra*; **Osborn v. Bank of U. S.**, 22 U. S. 9 Wheat. 738 [6:204], and **Brown v. Maryland**, 25 U. S. 12 Wheat. 419 [6:678], and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in **Thomson v. Union Pac. R. R. Co.**, 76 U. S. 9 Wall. 579 [19:792], and **Union Pac. R. R. Co. v. Peniston**, 85 U. S. 18 Wall. 5 [21:787]. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its **franchises or operations**.

In the recent case of **Farmers and Merchants Savings Bank v. Minnesota**, 232 U. S. 516, 58 L. Ed. 706 (which we shall use more fully in a subsequent portion of our argument), all the doctrines and principles of the cases preceding have been re-affirmed, this Court saying:

The American people have conferred the power of borrowing money on their Government, and by making that Government supreme, have shielded its action, in the exercise of this power, **from the action of the local government**. The grant of power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration

that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however, inconsiderable, it is a burden on the operations of the government. It may be carried to an extent which shall arrest them entirely.

We could multiply the citation of cases of similar import, but shall not do so, but we have endeavored to call the Court's attention to the typical ones, unfolding the doctrines and principles decisive of the case at bar.

The doctrines of these cases have never been swerved from by this Court, and these cases will thread through the other cases, which we shall later cite. Were it not for the persistent attempt, which the Legislature of the State of Oklahoma has always persevered in, and which the Supreme Court of Oklahoma has always sustained to tax similar subject matter, we would not feel justified in citing even so many cases of their import, to this Court.

Upon the doctrine of these cases alone, the tax sought to be imposed by the State of Oklahoma is condemned. We shall, however, hereafter proceed to cite other cases, which will fall in step with the march of these decisions, leading inevitably to the impossibility of the State of Oklahoma having any power, right or authority to impose taxes on the income solely derived from these leases on these restricted Indian lands.

III.

The leases themselves not being taxable by the State of Oklahoma, that State is wholly without power, right or authority to tax the income derived therefrom. If the source cannot be taxed, then the income derived from that source is exempt from taxation.

It has so far been conceded in this case that the leases involved are not themselves taxable by the State of Oklahoma. That question has been foreclosed by the decisions of this court, and there is no contention, up to this time, that these leases are directly subject to taxation by the State of Oklahoma.

In *Indian Territory Illuminating Oil Co. v. State of Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, this question is conclusively settled.

Holding that such leases are not taxable, this Court said:

A tax upon the lease is a tax upon the power to make them, and could be used to destroy the power to make them. **If they cannot be taxed as entities**, they cannot be taxed by taxing the stock, **whose only value is their value** or by taking the stock as an evidence of their value, rather than by directly estimating them as the Board of Equalization and referee did. The assessment of the Board was of the leases as objects of taxation, **having no immunity under the Federal Law.** * * * It is manifest, therefore, when the court took the stock as evidence of the value of the property of the Company, the court took it as evidence of the

value of the leases, and thereby justified their assessment and taxation. This, for the reasons we have stated, was **error**.

It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

So far, in this case, therefore, there has been no disagreement as to the status of the leases themselves, and it has been agreed that they cannot be directly taxed. The agreement has even gone farther than that, and, in the District Court, and in the Supreme Court, the learned Attorney General attempted to distinguish the income tax from other forms of taxation which had been denied.

Mr. Justice Kane, in the opinion which he handed down, in the first instance, sustaining our contentions, and affirming the judgment of the District Court, with reference to the agreement of counsel, which represented it at that time, said:

It is **agreed** between counsel that under the cases just cited it is settled law that oil and gas leases of lands in Oklahoma made on or behalf of restricted Indians under the authority of an Act of Congress are under the protection of the **Federal Government** and that the leases are **Federal Agencies** in whose hands the leases cannot be taxed either directly or vicariously.

This is the law, and unless the Attorney General shall veer from this agreement, we shall now assume it is the law, and if any question should be raised as

to its correctness before this Court, we stand ready to further sustain our contention.

The leases themselves, therefore, being non-taxable by the State of Oklahoma, it follows as a necessary sequence that the income from these leases, either net or gross, cannot be taxed. We need to cite but one case on this proposition, which will immediately follow.

In Pollock v. Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, in which the income statutes enacted by Congress prior to and leading to the Sixteenth Amendment were held invalid, the Court clearly holds that when **the property itself cannot be taxed** by the Federal Government or by a state, then **the income derived from that property or source is equally exempt** from the imposition of the tax. Otherwise, either the Federal Government or the State, barred by the constitution from taxing the source, could as effectually accomplish its purpose of reaching the source by taxing the income. As we shall hereafter show, no limitations or restrictions on the taxing powers of the State have been removed, and, as determining the character and effect of an income tax imposed by the State, it is of paramount and controlling authority now, as it was before the Sixteenth Amendment.

This case was extensively argued, beginning March 7, 1895, and the first opinion in the case was handed down on April 8, 1895, but the Court in the

first opinion merely held the Act of Congress imposing the income tax **invalid** as applied to rents or **income from real estate** and as to **income from municipal bonds**. The Court clearly held that the income from the real estate could not be taxed, because, under the act, the real estate itself could not be taxed, inasmuch as a tax upon the real estate would be in violation of the constitutional provision requiring direct taxes imposed by Congress to be apportioned among the States according to population. The Supreme Court, however, based its decision as to the income from municipal bonds, upon the theory that such income could not be taxed because of the **absolute lack of power** of the United States **to tax the bonds themselves from which the income is derived**. This case involved the income tax, and its holding is clear that, where the **source** of the tax as for instance, real estate or personal property or municipal bonds, cannot be **taxed**, then the **income** derived from this **source** is equally **exempt** from the imposition of the tax.

After an extensive discussion as to the difference between an excise and a property tax, the Court said:

As no capitation or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as a capitation tax) must be referred to, and it has always been considered that a tax upon real estate **eo**

nomine or upon its owners in respect thereof is a direct tax within the meaning of the Constitution. But is there **any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?**

If the Constitution had provided that Congress **should not levy any tax upon the real estate** of any citizen of any state, could it be contended that Congress **could put an annual tax for five or any other number of years upon the rent or income** of the real estate? And if as the Constitution now reads, no unapportioned tax can be imposed on real estate, can Congress without apportionment nevertheless impose taxes upon such real estate **under the guise of an annual tax upon its rents or income?**

As according to the feudal law, the whole beneficial interest in the land consisted in the right to take the * * * rents and profits, the general rule has always been, in the language of Coke, that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery **secundum formam chartoe**, the whole land itself doth pass. For "**What is the land but the profits thereof?**" Co. Lit. 45, and that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. Wills (5th Ed.) and cases cited.

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax

on real estate is a direct tax. Unless, therefore, **a tax upon rents or income** issuing out of the lands is **intrinsically so different from a tax on the land itself** that it belongs to a wholly different class of taxes, such taxes must be regarded as falling **within the same category as a tax on real estate eo nomine**. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership **belongs to the other?** We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us **the same in substance as an annual tax on the real estate**, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in **Hylton v. United States**, 3 U. S. 3 Dall. 171 (1:556), "**land, independently of its produce, is of no value;**" and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by **varying the form the substance may be changed**, it is not easy to see that **anything would remain of the limitations of the Constitution**, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions **cannot be thus evaded**. It is the **substance** and not the **form** which **controls** as has indeed been established by repeated decisions of this court. Thus in **Brown v. Maryland**, 25 U. S. 12 Wheat. 419, 444 (6: 678, 687), it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief

Justice Marshall said: "It is impossible to conceal from ourselves, that this is **varying the form, without varying the substance**. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the **sale** of an article, imported only for sale, is a tax on the **article itself**."

In **Weston v. Charleston**, 27 U. S. 2 Pet. 449 (7:481), it was held that a tax on the **income** of United States securities was a tax on the **securities themselves**, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Johnson and Mr. Justice Thompson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in **Dobbins v. Erie County Comrs.**, 41 U. S., 16 Pet. 435 (10:1022), it was decided that the income from an official position could not be taxed if the office itself was exempt.

In **Almy v. California**, 65 U. S., 24 How. 169 (16:644). It was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in **Northern Cent. R. Co. v. Jackson**, 74 U. S. 7 Wall. 262 (19:88), that a tax upon the **interest payable** on bonds was a tax not upon the **debtor**, but upon the **security**; and in **Cook v. Pennsylvania**, 97 U. S. 566 (24:1015), that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the **goods** sold.

In **Philadelphia & S. M. SS. Co. v. Pennsylvania**, 122 U. S. 326 (30:1200) 1 Inters. Com. Rep. 308, and **Leloup v. Mobile**, 127 U. S. 640 (32:311), 2 Inters. Com. Rep. 134, it was held that a tax on **income** received from interstate commerce was a tax upon the **commerce itself**, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. "The substance, and not the shadow, determines the validity of the exercise of the power." **Postal Telegraph Co. v. Adams**, ante, p. 311.

Nothing can be clearer than what the constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any state through a majority made up from the other states. It is true that the effect of requiring direct taxes to be apportioned among the states in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a state having the taxable subject matter to a larger extent in proportion to its population than another state has, would be less than in such other state, but this in-

equality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the states and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal Government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other, the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax **indirect** when it is essentially **direct**, the rule of protection **could be frittered away**, one of the great landmarks defining the boundary between the nation and the states of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid.

Holding that the tax could not be sustained, as to interest or income from municipal bonds, basing it upon the absolute lack of power in Congress to tax the source, the converse being true as to lack of power in the state to tax the leases now involved, the Court further said:

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of municipal bonds of the City of New York, from which it derives an annual income of \$60,000. and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

As the states cannot tax the powers, the operations, or the property of the United States nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state.

A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenue of municipal corporations are not subjects of Federal taxation. *Buffington v. Day*, 78 U. S. 11 Wall. 115 (20:122); *United States v. Baltimore & O. R. Co.*, 84 U. S. 17 Wall. 322, 332 (21:597, 601). In *Buffington v. Day*, *supra*, it was adjudged that Congress had no power, even by an

act taxing all incomes, to levy a tax upon the salaries of judicial officers of a state, for reasons similar to those on which it had been held in **Dobbins v. Erie Co. Comrs.**, 41 U. S. 16 Pet. 435 (10:1022), that a state could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers not granted, or, in the language of the 10th Amendment 'reserved' are as independent of the general government as that government within its sphere is independent of the states."

This is quoted in **Van Brocklin v. Anderson**, 117 U. S. 151, 178 (29:845, 854, and the opinion continues: "Applying the same principles, this court in **United States v. Baltimore & O. R. Co.**, 84 U. S. 17 Wall. 322 (21:597), that a municipal corporation within a state could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the state, created by the state to exercise a limited portion of its powers of government, and therefore, its revenues, like those of the state itself, were not taxable by the United States.

The revenues thus adjudged to be exempt from federal taxation were not themselves appropriated to any specific public use, nor derived from property held by the state or by the municipal corporation for any specific public use, but were part of the general income of that

corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a state or of a municipal corporation, which is a political division of the state, from federal taxation, equally require the exemption of all the property and income of the national government from state taxation.

In *Mercantile Nat. Bank of New York v. New York*, 121 U. S., 128, 162 (30:895, 904), this court said: "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

The question in *Bonaparte v. Appeal Tax Court of Baltimore*, 104 U. S. 592 (26:845), was whether the registered public debt of one state, exempt from taxation by that state or actually taxed there, was taxable by another state, when owned by a citizen of the latter, and it was held that there was no provision of the Constitution of the United States which prohibited such taxation. The states had not covenanted that this could not be done, whereas, under the fundamental law as to the power to borrow money, neither the United States on the one hand, nor the states on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each.

The law under consideration provides: "That nothing herein contained shall apply to states, counties or municipalities." It is contended that although the property or revenues

of the states or their instrumentalities cannot be taxed, nevertheless the income derived from state, county and municipal securities can be taxed. But we think the same want of power to tax the property or revenues from the states or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in **Weston v. Charleston**, 27 U. S. Pet. 2, 449, 468 (7:481) where he said: "The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this power depends on the will of a distinct government. **To any extent, however inconsiderable, it is a burden on the operation of government.** It may be carried to an extent which will arrest them entirely * * * The tax on the government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities, it is obvious that **taxation on the interest therefrom** would operate on the power to borrow before it is exercised, and would **have a sensible influence on the contract.** And that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

The Court, at the time this opinion was rendered, was divided upon the question as to whether or not the void provisions as to rents from real estate and income from municipal bonds invalidated the whole act, and as to whether or not income from

personal property, as such, came within the rule as to income from real estate, and whether or not any part of the tax, if not considered as direct, would be invalid for want of uniformity. A reargument of the case was had on a petition for rehearing, beginning on May 6, 1895, and the court rendered its opinion on May 20, 1895, as recorded in 158 U. S. 601, 39 L. Ed. 1109. Again considering carefully all the questions involved, the court adhered to its decision that the income tax on real estate was a direct tax, and also decided that the taxes on personal property fell in the same category, and held the entire act unconstitutional. The Court, therefore, emphatically reaffirmed its theory that, **where the source of income could not be taxed, the income itself was exempt from taxation.** We shall not quote extensively from this latter opinion, as it is but a strong affirmation of the one already handed down, adding thereto the income from personal property as well as real property.

On the rehearing, however, stress was laid on all the arguments and grounds now urged to lift the tax from the constitutional ban; and if the Court will read the arguments advanced to sustain the tax, it will find that the same arguments were then presented as are now claimed to maintain the tax in the case at bar.

In support of the position that the income from personal property was equally exempt with that of

real estate, and again referring to the court's holding that the income from municipal bonds could not be taxed by Congress, the Court said:

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not in the meaning of the constitution; and the court went no further, as to the tax on real estate, than to hold that it fell within the same class **as the source whence the income was derived**, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct, while as to the income from municipal bonds, **that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax** as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the **enforced subtraction** from the yield of all owner's real or personal property, **in the manner prescribed, is so different from a tax upon the property itself**, that it is not a direct, but an indirect, tax in the meaning of the constitution.

Referring to the arguments similar to those now made, and adhering to its position that there was a lack of power in Congress to tax interest on municipal bonds as a part of the taxpayer's income, the Court said:

The stress of argument is thrown, however, on the assertion that **an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or bond tax;** that it is an assessment upon the taxpayer on account of his money spending power as shown by his revenue for the year preceding the assessment; **that rents received, crops harvested, interest collected, have all lost connection with their origin, and although once not taxable, have become transmitted in their new form into taxable subject-matter;** in other words, that income is taxable irrespective of the source from whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that public dividends should be paid "free of all taxes and charges whatsoever; but Mr. Pitt successfully contended that the dividends for the purpose of the income tax were to be considered simply in relation to the recipient as so much income, and that the fund holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge. Financial Statements, 32.

The dissenting justice proceeded to effect upon this ground in **Weston v. Charleston**, 27 U. S. 2 Pet. 449 (7:481), but the court rejected it. That was a **state tax**, it is true; but the states have power to lay income taxes, and **if the source is not open to inquiry, constitutional safeguards might be easily eluded.**

We have unanimously held in this case that so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the states,

and their instrumentalities to borrow money, and consequently repugnant to the constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general with characteristic candor; and it follows that **if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax**; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the constitution.

In **Mosley v. State**, 115 Tenn. 57, 86 S. W. Rep. 714, the State of Tennessee undertook to tax income from United States bonds and all other stock not taxed **ad valorem**. The assessment schedules required the taxpayer to answer as to such income from such bonds. The taxpayer refused to answer the question, and he was indicted and convicted for so doing. The case is an interesting one and fully sustains our contentions.

The Court said:

So it appears that when the plaintiff in error refused to answer the question as to the amount of income derived by him from United States bonds, **he was resisting the power of the**

state to tax that income. No other question is made in this case.

Did the plaintiff in error act within his rights in so refusing? We are of opinion that he did. Really, the face of the bonds themselves issued by authority of the Federal Government, settle the question, based as they were upon the Federal statutes. In addition, it has been held ever since the case of **Weston et al. v. City of Charleston**, 2 Pet. 449, 7 L. Ed. 481, decided in 1829, that the states have no power to tax the governmental agencies of the Federal Government. Said the court in that case, speaking through Chief Justice Marshall: "A contract made by the Government, in the exercise of its power to borrow money on the credit of the United States, is undoubtedly independent of the will of any state in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the Government was created." It ought therefore, on the principles settled in the case of **McCullough v. State of Maryland** (4 Wheat. 316, 4 L. Ed. 579), to be exempt from state taxation, and consequently, from being taxed by corporations deriving their powers from states.

Again, it is said in the same opinion:

The right to tax a contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence upon the contract. The extent of this influence depends on the will of a distinct Government. **To any extent, however insensible, it is a burden on the operations of the Government.** It may be carried to an extent which will arrest them entirely.

Referring to the foregoing authority, Chief Justice Fuller, in the case of **Pollock v. Farmers' Loan & Trust Co.**, mentions the fact that the ordinance in the City of Charleston involved in that case was exceedingly obscure, but that the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, made it clear that the levy was upon the interest of the bonds, and not upon the bonds; and in the case last referred to, Chief Justice Fuller treated **Weston v. Charleston** as an authority holding that a tax on the income of the United States securities was a tax on the securities themselves and equally inadmissible. 157 U. S. 429, 58; 15 Sup. Ct. 673. 39 L. Ed. 819.

Continuing the discussion, it is further said in that case:

"So, in **Dobbins v. Erie Co. Commissioners**, 16 Pet. 435, 10 L. Ed. 1022, it was decided that the income from an official position could not be taxed, if the office itself was exempt.

In **Almy v. Cal.**, 24 How. 169, 16 L. Ed. 644, it was held that a duty on a bill of lading was the same thing as a duty on the articles which it represented (**Northern Cen. R. Co. v. Jackson**, 7 Wall. 262, 19 L. Ed. 88); that a tax upon the interest payable on bonds was a tax, not upon the debtor, but upon the security; and in **Cook v. Penn.**, 97 U. S. 566, 24 L. Ed. 1015, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In **Philadelphia & S. M. S. S. Co. v. Penn.**, 122 U. S. 326, 7 Sup. Ct. Rep. 1118, 30 L. Ed. 1200, 1 Interst. Com. R. 308, and **Leloup v. Mobile**, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311, 2 Interst. Com. R. 134, it was held that a tax on income received from interstate com-

merce was a tax upon the commerce itself, and therefore unauthorized." 157 U. S. 429, 581, 582, 15 Sup. Ct. 673, 39 L. Ed. 759, 819. These authorities were also referred to, to the same effect, in the opinion of Mr. Justice Field, pages 591-592 of 157 U. S. page 693 of 15 Sup. Ct. (39 L. Ed. 823). The principle is also recognized in the opinions of the other two judges who delivered the opinions in the case—Mr. Justice White and Mr. Justice Harlan.

After having discussed the authorities that the United States could not tax the income on bonds issued by a state, the Court concluded as follows:

The proposition seems to be well established in Federal decisions that, if the security is exempt, the interest on the security is likewise exempt.

It is insisted by counsel for the state in the present case, that when the interest is paid, it falls into the general mass of the property of the state, and is then subject to taxation by the state.

Under what circumstances it may be justly said that the interest received for non-taxable securities has fallen into the general mass of the property of the state, we need not consider, inasmuch as the authorities above referred to—and they are controlling—hold that the interest does not become taxable immediately upon being paid into the hands of the holder of the security.

These cases, in connection with the others which we have heretofore cited, conclusively establish the rule that, where the source of income cannot be

taxed by a taxing power, either Federal or State, income derived therefrom cannot be taxed.

The learned Attorney General and his learned Assistant conducting the case, however, in the Trial Court, and before the Supreme Court of Oklahoma, took the position that the Sixteenth Amendment to the Constitution of the United States, giving Congress the power to tax incomes with liberation from the rule of apportionment, has enlarged the taxing powers of the States, and that the same limitations and restrictions theretofore existing upon the taxing powers of the State, do not now exist as they did prior to the Sixteenth Amendment. This, however, is manifest error, and, in order to dispose of the question for all time, we now cheerfully show the Court that there is nothing to this contention.

The amendment does not, in its terms, give any additional power or authority to the states, but is confined exclusively to a **grant of power to Congress**, and merely to lay and collect taxes on incomes, from whatever source derived, **without apportionment among the several states, and without regard to any census or enumeration**. Aside from the necessity of apportionment of income taxes imposed by Congress, from sources that would be direct or capitation taxes, without the amendment, the **taxing powers of the United States and the states are the same as before the adoption of the amendment**, and not a single restriction or limitation imposed upon the State by

the constitution of the United States has been removed. In other words, the Sixteenth Amendment was not adopted to confer upon Congress the power to tax incomes, but simply to relieve it from the necessity of apportioning such taxes among the several states, when such income should be derived from either **real estate or personal property**, since the doctrine then was, and now is, that such income tax was a direct tax, because, in effect, **a tax upon the source of the income**. The case, therefore, of **Pollock v. Loan and Trust Co.**, 157 U. S. 429, and 158 U. S. 601, has not, therefore, in its rulings and doctrines been modified by the amendment, **except as to the requirement of apportionment of taxes derived from real estate and personal property**. The nature and character of the tax is the same as in that case declared, and **merely the rule of apportionment has been swept aside by the amendment**. Where the State could not tax before the amendment, it cannot tax since the adoption thereof.

The text of the amendment clearly shows this, reading as follows:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

The power to tax incomes rested in Congress before the adoption of the amendment, when derived

from both real estate and personal property, but it was compelled to do so under the constitutional limitation that taxes from such **sources must be apportioned** among the several states, as provided by the constitution. The amendment, therefore, gave Congress **no new power**, but operated merely to relieve it from the rule of apportionment provided by the constitution.

The status of the States, however, is not affected nor changed by the amendment in the slightest degree. **Every limitation or restriction imposed by the constitution upon a state remains absolutely unabated and without change.**

In **Brushaber v. Railroad Co.**, 240 U. S. 1, 60 L. Ed. 493, in sustaining the constitutionality of, and construing, the first Income Act of Congress, after the adoption of the amendment, the Supreme Court of the United States has clearly stated the purpose and effect of the Sixteenth Amendment, and fully sustains the interpretation as now claimed.

Stating the classification and status of taxation by Congress under the constitution, before the adoption of the amendment, the Court said:

That the authority conferred upon Congress by Section 8 of Article 1, "to lay and collect taxes, duties, imposts and excises," is exhaustive and embraces every conceivable power of taxation, has never been questioned; or, if it has, has been so authoritatively declared as to render it necessary only to declare the doctrine. And it has also never been from the founda-

tion, without stopping presently to determine under which of the separate headings the power was properly to be classed, that **there was authority given**, as the part was included in the whole, **to lay and collect income taxes**. Again, it has never, moreover, been questioned that the conceded complete and all-embracing taxing power was subject, so far as they were respectively applicable to **limitations** resulting from the requirements of Article 1, Section 8, cl. 1, that "all duties, imposts and excises shall be uniform throughout the United States," and to the **limitations** of Article 1, Section 2, cl. 3, that "direct taxes shall be apportioned among the several states," and Article 1, Sec. 9, cl. 4, that "no capitation, or other direct, tax should be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." In fact, the two great subdivisions embracing the complete and perfect delegation of the power to tax and the two **correlated limitations** as to such power were thus aptly stated by Mr. Chief Justice Fuller in **Pollock v. Farmers' Loan & T. Co.**, 157 U. S., *supra*, at page 557: "In the matter of taxation, the constitution recognizes two great classes of direct and indirect taxes, and lays down two rules by which they must be governed, namely, the rule of **apportionment as to direct taxes**, and the rules of uniformity as to duties, imposts and excises." It is to be observed however, as long ago, as **Veazie Bank v. Fennon**, 8 Wall. 533, 541, 19 L. Ed. 482, 485, that the requirements as to apportionment as to one of the great classes and of uniformity as to the other class were not so much a limitation upon the complete and all-embracing authority to tax, but in their essence were **simply regulations concerning the mode in which the plenary power was to be exerted**. In

the whole history of the Government down to the time of the adoption of the 16th Amendment, leaving aside some conjectures expressed of the possibility of a tax lying intermediate between the two great classes embraced by neither, no question has been anywhere made as to the correctness of these propositions.

After quoting and setting forth the text of the amendment, the Court further said:

It is clear on the face of this text that it does not purport to confer power to levy income taxes in a general sense—an authority already possessed and never questioned, or to limit and distinguish between one kind of taxes and another, but that **the whole purpose of the amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived.** Indeed, in the light of the history which we have given and of the decision in the Pollock case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock case was decided; that is, of **determining** whether a tax upon income was direct not by a consideration of the burden placed on the income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the amendment provides that income taxes, from whatever source the income may be derived shall not be subject to the regulation of apportionment.
 • • • Indeed, from another point of view, the amendment demonstrates that no such pur-

pose was intended, and on the contrary shows that it was drawn with the object of maintaining the limitations of the constitution and harmonizing their operation. We say this because it is observed that although from the date of Hylton case, because of statements made in the opinion of that case, it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the amendment contains nothing **repudiating or challenging** the ruling in the Pollock case that the word "direct" had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore, the amendment at least impliedly makes such wider significance a part of the constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby take an income tax out of the class of excise, duties and imposts, and place it in the class of direct taxes.

In **Peck & Co. v. Lowe**, 247 U. S. 163, 62 L. Ed. 1049, one of the cases cited and relied upon by the learned attorney general, our contention is fully sustained, where the court, referring to the effect of the Sixteenth Amendment, said:

The 16th Amendment, although referred to in the argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power

to new or excepted subjects, but merely removes all occasions which otherwise might exist, for an apportionment among the states of taxes laid on income, whether derived from one source or the other.

The Court then proceeds to show that limitations and restrictions, which had theretofore existed against the exercise of taxing power, in contravention of the Constitution of the United States, were still in force, with the sole exception as noted, following the adoption of the Sixteenth Amendment. The Court cited with approval the case of **Brushaber v. Railroad Company**, *supra*, and other cases.

In **Eisner v. Macomber**, 252 U. S. 189, 64 L. Ed. 521, the same question arose before this Court, and the effect of the Sixteenth Amendment is clearly interpreted and stated.

This Court, beginning on page 205, said:

The 16th Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the Amendment was adopted. In *Income Tax Cases* (**Pollock v. Farmers Loan & T. Co.**) 158 U. S. 601, 39 L. Ed. 1108, 15 Sup. Ct. Rep. 912, under the Act of August 27, 1894 (Chap. 349, Secs. 27, 28, Stat. at L. 509, 553), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the States

according to population, as required by art. 1, § 2, cl. 3, and § 9, cl. 4, of the original Constitution.

Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the 16th Amendment was adopted, in words lucidly expressing the object to be accomplished: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." As repeatedly held, **this did not extend the taxing power to new subjects**, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. **Brushaber v. Union P. R. Co.**, 240 U. S. 1, 17-19, 60 L. Ed. 493, 501, 502, L. R. A. 1917 D. 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; **Stanton v. Baltic Min. Co.**, 240 U. S. 103, 112 et seq., 60 L. Ed. 546, 553, 36 Sup. Ct. Rep. 278; **William E. Peck & Co. v. Lowe**, 247 U. S. 165, 172, 173, 62 L. Ed. 1049-1051, 38 Sup. Ct. Rep. 432.

A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.

In **Evans v. Gore**, 253 U. S. 245, L. Ed. 64, 887, involving the right to tax the salary of a Federal Judge under the Income Tax Statutes passed by

Congress after he had taken his position, this Court held that it could not be done, and succinctly stated the effect of the Sixteenth Amendment, said, beginning on page 269):

Let us turn, then, to the circumstances in which this Amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (Art. 1, §2, cl. 3, and §9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in **Pollock v. Farmers' Loan & T. Co.**, 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673; 158 U. S. 601 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the court—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable

income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the 16th Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for **such an apportionment** because of the source from which the income came—a change in **no wise affecting the power to tax**, but only the mode of exercising it. The message of the President recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates on the resolution by which it was proposed, and the public appeals, corresponding to those in the Federalist, made to secure its ratification, leave no doubt on this point. And that the proponents of the Amendment, in drafting it, lucidly and aptly expressed this as its object, is shown by its words:

“The Congress shall have to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.”

True, Governor Hughes, of New York, in a message laying the Amendment before the Legislature of that state for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth statesmen who participated in proposing the Amendment such convincing expositions of its purpose, as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it **does not extend the taxing power to new or excepted subjects**, but merely removes all occasion otherwise ex-

isting for an apportionment among the states of taxes laid on income, whether derived from one [262] source or another. And we have so held in other cases.

In **Brushaber v. Union P. R. Co.**, 240 U. S. 1, 60 L. ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713, where the purpose and effect of the Amendment were first drawn in question, the chief justice reviewed at length the legislative and judicial action which prompted its adoption, and then, referring to its text, and speaking for a unanimous court, said pp. 17, 18:

“It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided; that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment.”

What was there said was reaffirmed and applied in **Stanton v. Baltic Min. Co.**, 240 U. S. 103, 112, 113, 60 L. ed. 546, 553, 554, 36 Sup. Ct. Rep. 278, and **William E. Peck & Co. v. Lowe**, 247 U. S. 165, 172, 62 L. ed. 1049, 1050, 38 Sup. Co. Rep. 432, and in **Eisner v. Macomber**, 252 U. S. 189, ante; 521, 9 A. L. R. 1570, 40 Sup. Ct. Rep. 189, decided at the present term, we again held, citing the prior cases, that the Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income."

After further consideration, we adhere to that view and accordingly hold that the 16th Amendment does not authorize or support the tax in question.

We start, therefore, with the fundamental proposition that the Sixteenth Amendment to the constitution of the United States has not removed, modified nor diminished any of the **limitations and restrictions against the exercise of the power of taxation by any of the states**, which existed prior to the adoption of that amendment, and that the State of Oklahoma cannot seek cover under such a doctrine. What the State **could not tax** before the adoption of the amendment, is now **equally and as absolutely exempt from taxation by the State**.

The Sixteenth Amendment, therefore, according to **Brushaber v. Railroad Company**, *supra*, "was drawn with the object of maintaining the limitations of the constitution." Also, according to the same

case, "the amendment contains nothing repudiating or challenging the ruling in the Pollock case." Also, according to the same case, it is clearly demonstrated, "that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended; that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself, and thereby take an income tax out of the class of excise, duties and imposts, and place it in the class of direct taxes."

It is perfectly apparent, therefore, that the Sixteenth Amendment to the Federal Constitution has not in the slightest degree affected the powers of the State as to taxation, but it is now hedged with the same restrictions and limitations as it was before the adoption of that amendment. So, we must approach the decision of this case, so far as the power of the State of Oklahoma to tax, as if the Sixteenth Amendment had never been adopted as a part of the organic law of our Nation, as it relates solely to the powers of Congress, and does not bestow any additional powers upon any of the states forming constituent parts of the Union.

IV.

The State of Oklahoma has no right, power or authority to tax income derived solely from oil and gas leases upon restricted Indian lands subject to the control of Congress, and the approval of the Department of the Interior, and its control and regulation, inasmuch as such a tax would be one upon a Federal Agency, and upon an instrumentality or means employed by Congress to carry into effect the powers conferred by the constitution upon Congress, and therefore, if the Act of the Legislature of Oklahoma, approved March 17, 1915, and as amended, be applied to such income by the State of Oklahoma or by its officers, agents or representatives, the same is unconstitutional and void, and in contravention and violation of the constitution, laws, treaties and agreements of the United States.

After having called the Court's attention to a few of the typical cases, without attempting to exhaust them, demonstrating the underlying principles of law to be applied in determining the case at bar, we now reach the sole question, which is presented to this Court, and that is, whether or not the State of Oklahoma has any power, right or authority to impose and collect taxes upon income derived solely from the Departmental leases involved on restricted Indian lands, as set forth in the Supplementary Returns.

As the Record shows, and which is undisputed, and cannot be disputed, the Indians have no right to make these leases, except with the approval of the Secretary of Interior, and the leases are made in pursuance of the provisions of the Acts of Congress,

and the Treaties and Agreements made with the Indians, and the leases, when made, are operated under minute rules and regulations promulgated by the Secretary of the Interior, or by the Interior Department, and the royalties are paid to the Indian Agents or Superintendents, and disbursed in accordance with such rules and regulations. The question, therefore, is squarely presented to this Court, whether or not the State of Oklahoma has the power, right or authority to tax income derived from such oil and gas leases.

We unhesitatingly assert that the State has no such power, right or authority. If the State be permitted to impose such a tax, it would result, by means of taxation, in retarding, impeding, burdening, controlling and affecting the operation of the constitutional laws enacted by Congress to carry into effect and execution the powers vested in the Federal Government.

From the cases which we have heretofore cited, to which many similar cases could be added, we start, therefore, upon this sole question, now presented to this court, with the following postulates established:

First. The leases involved, and the defendant as the lessee, are instrumentalities and agencies of the Government of the United States, through which it is discharging its duty to the Indians, and exercising its governmental powers and functions, and are

the instruments and means employed by Congress to carry into effect the powers conferred upon it by the Federal Constitution.

Second. The States have no power, by taxation or otherwise to retard, impede, burden, or in any manner control or effect, in the slightest degree, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Government of the United States, and cannot tax to any extent the instrumentalities and agencies of the Federal Government, nor any means employed by Congress to carry into effect the powers conferred by the Federal Constitution, and any tax imposed, or any attempt to impose a tax, therefor or thereon, however slight or insensible its effect may be, or no appreciable effect appearing, is repugnant to the Constitution of the United States. The State of Oklahoma is absolutely without power or authority to so tax.

Third. The leases themselves not being taxable by the State of Oklahoma, that State is wholly without power, right or authority to tax the income derived therefrom. If the source cannot be taxed, then the income derived from that source is exempt from taxation.

With the doctrines and principles established by the cases, which we have heretofore cited, we would be content to rest the case upon them. These

cases stated the general principles (and they could be multiplied almost without limit), which establish every contention we are making in this case. In view of the fact, however, that the Legislature of the State of Oklahoma has seemed to sedulously undertake to reach and tax this subject matter, and the Supreme Court of Oklahoma has seemed always to lend a willing ear to the siren song of its legislative coadjutor, we feel justified in reaching to the uttermost to dispel the doctrines invoked.

So far, and such we presume will continue to be the fact, counsel have agreed as to the first postulate named. This is clearly shown by the first opinion handed down by the court, through Justice Kane of the Supreme Court of Oklahoma, saying in that opinion:

As it is **agreed** between counsel that under the cases just cited it is settled law that oil and gas leases of lands in Oklahoma made by or on behalf of restricted Indians under the authority of an Act of Congress **are under the protection of the Federal Government and that the lessees are Federal Agencies in whose hands the leases cannot be taxed either directly or vicariously**, it will not be necessary to notice any of the aspects of the case at bar except those which the Attorney General contends **distinguish it from the cases cited.**

It has been universally held by this Court that the authority of a State to tax does not, and cannot, extend to the taxation of the instrumentalities of the

Federal Government, nor to the agencies of the Federal Government, nor to the means employed by Congress to carry into effect the powers conferred upon it by the Federal Constitution.

So far as we know now, the exact question has never been presented to and decided by this Court. The State of Oklahoma, however, in every form possible, has tested its right to impose a gross production tax upon the **gross income** derived from such leases, and this Court has in every instance denied its right, power or authority to do so. Also the State of Oklahoma has indirectly attempted to tax such leases, and that right has been denied by this Court.

Substantially the same question we are now presenting to this Court had been before it in, at least, seven cases, in two of which, differing in some respects, this Court delivered a formal opinion, and, in the other five, doubtless considering the questions foreclosed, handed them down in each instance merely a memorandum opinion in each case.

The cases, in which this Court handed down formal and written opinions, are as follows:

Choctaw, Oklahoma & Gulf Railroad Co. v. Harrison, 235 U. S. 292.

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522.

The case, in which this Court handed down memorandum opinions, are as follows:

Howard v. Gypsy Oil Co., 247 U. S. 503-504.

Howard v. Indian Territory Illuminating Co. 247 U. S. 503-504.

Howard v. Oklahoma Oil Co., 247 U. S. 503-504.

Howard v. Barnsdal Oil Co., 247 U. S. 503-504.

Large Oil Co. v. Howard, 248 U. S. 549.

Notwithstanding, however, these numerous cases already decided by this Court, and notwithstanding the District Court of Oklahoma County, Oklahoma, had rendered its judgment in favor of the defendant and taxpayer, and notwithstanding the fact that the Supreme Court of Oklahoma, as constituted with its experienced Justices, had delivered a strong opinion affirming the judgment of the District Court, upon a petition for rehearing, and without any opportunity to reargue the case orally, the learned Chief Justice, who had been an attorney for the State in some of these very cases, leading the new members of the Supreme Court, changed the former decision of the Supreme Court of Oklahoma, and finally had the Supreme Court of his State to run true to past form, and sustained the taxes involved.

We shall therefore, now take up the cases directly in point, involving exactly cases of the same kind and character as now before the Court, and demon-

strate that the taxes imposed cannot be sustained. We shall present to the Court cases involving leases identically in terms and character as those now under consideration.

In **Indian Territory Illuminating Oil Co. v. State of Oklahoma**, 240 U. S. 522, there is found a case, which, upon principle, unqualifiedly decides all questions involved in favor of our contentions. It is a case, which is on all fours on principles with the case at bar, and the same as to the facts involved.

In this case there was an attempt by indirection to reach oil and gas leases upon Osage Lands, identical in terms and nature with the leases on the Osage lands involved in the case at bar, but this Court refused to permit this to be done.

This case, in connection with the case of **Pollock v. Loan & Trust Co.**, 157 U. S. 429, and 158 U. S. 601, heretofore cited in this Brief, settles every question involved in this case. The Pollock Case holds, as we have shown, that, where the source cannot be taxed, the income therefrom cannot be subjected to taxation. This case plainly follows that doctrine; and, having held that one of these Osage leases could not be directly or vicariously taxed, held that the State of Oklahoma could not indirectly impose a tax, which would ultimately rest upon these Osage leases.

Upon the authority, therefore, of this case, in connection with the Pollock Case, it is absolutely

demonstrated that the State of Oklahoma cannot tax the income involved. This case is directly in point, as it involves identically the same leases as are now involved in the case at bar.

The syllabus, showing the holding of the Court in this case, is as follows:

A State may not, when assessing for purposes of taxation the corporate assignee of an oil and gas lease of Osage lands, (made under the authority of the Act of February 28, 1891, (26 Stat. at L. 794, Chap. 383, Comp. Stat. 1913), Sec. 4195, and extended by Act of March 3, 1905, (33 Stat. at L. 1049, Chap. 1479, Com. Stat. 1913, Sec. 3986), which recognized the assignment) including in such assessment the lease and rights thereunder, either as separate objects of taxation or as represented or valued by the stock of the corporation.

The Court said, stating the facts as they threaded through the opinion:

The question in the case is whether a certain assignment of a lease and rights thereunder, made by the Osage Tribe of Indians, which conferred the privilege of prospecting, drilling and mining and producing petroleum and natural gas upon lands in Oklahoma Territory, are subject to a tax assessed under the laws of Oklahoma as the property of plaintiff in error in its capacity as a public service corporation.

Plaintiff in error, herein designated as the Oil Company, as assignee of the lease, and asserts the negative of the question, contending that under the lease it became "a Federal

agent, acting under a Federal appointment and authorization, in the development of lands belonging to the Osage Tribe of Indians, and that its business, license or permit as such cannot be taxed by the State Government, although its physical properties are always subject to taxation." It rests its contention upon the Act of Congress of February 28, 1891, (26 Stat. at L. 794, Chap. 383, Comp. Stat. 1913, §4195), and an Act of Congress of March 3, 1905, (33 Stat. at L. 1049, 1061, Chap. 1479, Comp. Stat. 1913 §3986), which extended the lease to the extent of such portion of the lands as had been subleased, namely 680,000 acres.

By the Act of 1891, it was provided: "That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for grazing or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

The Act of 1905, recognized the oil company as the owner by assignment of the lease, which assignment was approved by the Secretary of the Interior, and extended the lease for a period of ten years from March 16, 1906, with all the conditions of the original lease, except that from and after that date the royalty to be paid should be \$100. on each gas well instead of \$50, as provided in the lease, and except that the President of the United States should determine the amount of royalty to be paid to all.

The state opposes the contention of the oil company and asserts that the lease was, "not a grant of authority, franchise or privilege to any particular person or corporation and is merely a permit to the Osage Tribe, authorizing such tribe to lease to any person or any number of persons upon the approval of such lease contract by the Secretary of the Interior." It further asserts that the oil company merely occupied "the position of an independent contractor, acting for itself and in its own behalf, in a contract with the Osage Indian Tribe, and that, therefore, the relation of principal and agent between it and the government did not exist.

A statement of the case is as follows: The oil company made a sworn return of what it considered the fair cash value of that part of the property engaged in the public service at \$58,835.10. The State Board of Equalization, after a hearing, increased the valuation to \$538,350, the basis of the order of the Board being that the oil company was not protected from taxation by the lease from the Indians. Under the procedure of the State, the oil company appealed from that order to the Supreme Court of the State.

In the latter court a referee was appointed to take testimony and report his findings of fact and conclusions of law. He duly reported the facts and from them also reported as a conclusion of law that the oil company was "liable to taxation by the State of Oklahoma for the full value of its property, tangible and intangible, that is for the sum of \$500,000;" and that it was "not exempt from taxation upon the theory that it is a Federal agent, or that it holds a franchise from the Federal Government," and he recommended that judgment

be entered fixing the assessment of the oil company's property for taxation for the year 1911, at \$447,169.98, this being the difference between the total value of all property and the amount (\$52,830.02) locally assessed.

The report was confirmed, the court adjudging that the property of the oil company be assessed as recommended by the referee.

The question in the case seems to be a simple one. It is given some complexity by the opinion of the court on the re-hearing, which requires some reconciliation. It appears from the findings of the referee that on March 16 1896, the Osage Nation of Indians in Oklahoma Territory entered into a contract with one Edwin B. Foster, by the terms of which Foster had a blanket lease upon the Osage Reservation for the sole purpose of prospecting and drilling wells and mining and producing petroleum and natural gas only. The lease was for a term of ten years and was approved by the Secretary of the Interior. By an Act of March 3, 1905, Congress extended the lease as to 680,000 acres. The lease has therefore expired. Prior to its extension in 1905, the lease was assigned to the oil company.

The oil company has sublet to more than one hundred persons and corporations and the operations upon most of the lands covered by the lease have been and are conducted by sub-lessees. A small portion, the amount not appearing, is operated by the oil company.

By the terms of the lease, as extended, the sublessees are required to pay a royalty of 1-6 of the oil produced upon the property, of which 1-24 goes to the company and 3-24 to the Indians, the payments on behalf of the latter being made to the Indian Agency, under and by virtue of the rules and regulations of the Department of the Interior.

The oil company has laid pipe lines upon the leased lands for conveying natural gas, and it has been its practice to furnish gas to the sublessees for use as fuel for their drilling and pumping operations at a flat rate, the amount of which is not disclosed. The company also furnished gas during 1911, for domestic consumption to the residents of Bigheart and Avant, two small towns in which it had no franchise, in the Osage Nation, adjacent to the pipe lines of the company. It also furnished gas to a local corporation in the City of Bartlesville, which company held a franchise for and was engaged in the business of selling gas to the residents of that city, and also to a local distributing company at the town of Ochelata for use in the business of the latter company in selling gas to the inhabitants of that town.

By the terms of the contract with the Osage Indians the Company was required to furnish gas free to the Osage Citizens for use in the public institutions of the Osages under certain conditions named.

The oil company is primarily engaged in the business of oil production, and its operations in the gas business are conducted as an incident to the development of the oil territory and the production of oil, and, to some extent, as a matter of accommodation to the citizens of Bigheart and Avant, and the other persons residing along the company's pipe lines.

In 1911, the company made a sworn return of \$53,833.10, as the actual cash value of that part of its property engaged in the public service by reason of the gas business transacted by the company. This valuation was raised by the Board of Equalization to \$538,350. Certain of the company's property was returned to the local assessors and assessed at \$52,830.92. All

of its property is situated in Osage and Washington Counties, Oklahoma, and the total value of its stock, including all its property, tangible and intangible, was \$500,000.

The property returned to the Board of Equalization and to the local assessors **did not include the lease, subleases, contracts, and franchises of the company, but only its physical property**, it being contended by the company that such **lease, subleases, contracts and franchises were not subject to taxation.**

The total value of the company's property of every kind located in Oklahoma over and above the amount locally assessed was \$447,169.98 on February 1, 1911.

The gas business of the company has not been profitable, but has been and is valuable as an adjunct to its oil business.

Against the confirmation of the report of the referee the court said that the oil company made four contentions: (1) That it was not a public service corporation and that the Board of Equalization was without authority to assess its property. (2) That its oil and gas leases were not property used in any public service rendered by it. (3) That the leases were not the subject of taxation in the hands of the lessee or his assigns. (4) That in exercising the rights under the laws and by the Act of Congress extending the lease **the oil company was a Federal agency or exercised a privilege or franchise granted by the Federal Government, and that the lease, therefore, was not subject to taxation.**

The court held: (1) That the company was a public service corporation; (2) That the Board of Equalization had the power to assess to the company other property than that used in connection with public service; (3) That

the oil and gas lease was property and must be assessed in the name of the owner of the lease, and not in the name of the lessor; and (4) that by reason of the Act of Congress of 1905, the gas, oil and other minerals under the lands remained the property of the Osage Tribe, and that the power of Congress over the property could not be questioned. And distinguishing between the property of a Federal Agent and the operations of such agent, it was held "that the tax sought to be levied was not invalidated because sought to be levied upon a Federal Agency or upon a franchise granted by the Federal Government; or because it interfered with the power of Congress to regulate Commerce between the Indian Tribes."

On rehearing the court modified or changed its view. The changes and the reasons for them are not easy to represent. In the first opinion, the report of the referee was confirmed and it was adjudged that the property of appellant (oil company) be assessed as recommended by the referee in his report. "In the second opinion, the report of the referee is again confirmed and the estimate of the property of the company \$500,000 held to be sustained by the testimony taken before the referee; **but the reasoning of the opinion is quite different.** For a statement of the difference we may adopt for convenience that of the Attorney General of the State. He says: "The essential difference between the original opinion and the opinion on rehearing being that in the original opinion it was held that oil and gas leases, as such, constitute property as defined by the constitution and statutes of the State of Oklahoma, and as such was subject to taxation by said State, while the opinion on rehearing held that oil and gas leases, as such, were not defined as

personal property subject to taxation under the Statutes of Oklahoma, nor by the Constitution of said State, and, therefore, could not be taxed as personal property; but that under the statutes **the market value of the capital stock** of said corporation could be taken into consideration by the State Board of Equalization in assessing the properties of said company, could be properly considered an element of value in assessing said properties, and that the evidence taken before the referee as to the amount of the capital stock of said company and the market value thereof, together with its tangible assets, was sufficient to sustain the assessment made by the State Board of Equalization."

It is clear that the Board of Equalization and the sustaining of its action proceeded upon the consideration that **the leases constituted taxable property**, and the **first opinion of the Court**, confirming the report of the referee, had its basis in the same consideration. The consideration was regarded as **untenable in the second opinion**, but the court adhered to its former conclusion; that is, that the report of the referee, should be confirmed. The Board of Equalization, the referee, and the court in its first opinion, **regarded the leases as taxable entities**. In the second opinion it was held that they could not be so regarded under the constitution of the state, but the court gave them **effective representation in the capital stock of the company**, and the latter was taken **as evidence that the value of the property of the oil company was \$500,000**. Whether the constitution of the State permits this accommodation we are not called upon to say. We are clear it cannot be permitted to relieve from the restraints upon the power of the State to tax property under the protection of the Federal Government.

That the leases have the immunity of such protection we have decided.

In *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S., 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27, the railroad company was the lessee of certain coal mines, obligating itself to take out annually specified amounts of coal and to pay a stipulated royalty. It proceeded actively to develop the mines, either directly or through its agents, and took therefrom large quantities of coal and fully complied with the obligations assumed. The State of Oklahoma attempted to tax the company under a law of the state requiring every person engaged in the mining or production of coal to make a report of the kind and amount produced and the actual cash value thereof, and at the same time pay to the State Treasurer a gross revenue tax in addition to the taxes to be levied upon an ad valorem basis upon such mining property, equal to 2 per cent of the gross receipts from the total production. The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duties to the Indians.

The application of the case to that at bar needs no assisting comment. A tax upon the lease is a tax upon the power to make them, and could be used to destroy the power to make them. If they cannot be taxed as entities, they cannot be taxed vicariously by taxing the stock as an evidence rather than by directly estimating them as the Board of Equalization and the referee did. The assessment by the board was of the leases as objects of taxation, having no immunity under Federal law. This was repeated by the referee, and he made it clear that the assessment was so constituted. There was, as he reports, a local assessment by the assessors

of Osage and Washington Counties of \$52,830.-02, and that the total value of the oil company's "property of every kind located in Oklahoma, over and above the amount locally assessed, was \$447,169.48, on February 1, 1911, and he recommended a judgment for the latter amount. And we repeat, there is no doubt of what elements it was composed. The gas business, he reports, was not "of itself profitable," but was "valuable as an adjunct to the company's oil operations." He was explicit as to what the stock of the company represented, saying that "the total value of said company's stock, including all its property, tangible and intangible, on the 1st day of February, 1911, was \$500,000." It is manifest, therefore, when the court took the stock as evidence of the value of the property of the company **the court took it as evidence of the value of the leases**, and thereby justified their assessment and taxation. This, for the reasons we have stated, was error.

It follows from these views that the assessment against the oil company, **so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.**

We need no clearer authority than the preceding case for the blasting of the income tax by the Statutes of Oklahoma as applied to income derived from leases on restricted Indian lands. The Supreme Court of Oklahoma used every device that judicial ingenuity could conjure to sustain the tax imposed in the preceding case, but this court, ever jealously guarding the domain of its own Government, denied every specious contention sustaining the tax, and clearly held that the State of Oklahoma

could not directly nor indirectly tax a Federal Agency, instrumentality, franchise, right or privilege derived from that Government. The Supreme Court of Oklahoma, in its opinion, swung the base of its final decision as far from the leases involved as it could, and sought to sustain the tax by predicated it upon the stock as evidence of value, but this court would not allow the substance to be changed and cut through the veil of form by which the tax was screened, and although the thing taxed was remote from the lease itself, refused to permit the lease to be thus indirectly and remotely affected by the tax, and would not listen to the specious judicial incantation, and refused to allow the Supreme Court of Oklahoma to change the substance by mumbling a different name.

If, by drawing to the remoteness of the stock, based upon such a lease, the State cannot impose a tax based upon that, how much more impossible is it for the State to tax directly the income from the lease, which is the most direct and consequential thing that flows from the lease to both lessor and lessee, and is part and parcel of it, with absolutely no line of demarcation or separation.

This case, in connection with the case of **Pollock v. Loan & Trust Co.**, 157 U. S. 429 and 158 U. S. 601, settles this case conclusively in favor of the defendant and taxpayer. Taken together, they are a complete demonstration of every contention we make.

The Indian Territory Illuminating Oil Company Case clearly establishes that the leases involved, and the lessee, are agencies and instrumentalities of the Government of the United States, and that the leases themselves are not taxable. The Pollock cases clearly establishes that, where the source of income is not taxable, then the income derived from that source is not taxable.

As we have heretofore stated, it has so far been conceded, and it must always be conceded, and it is the law, "that the lessees are Federal agencies, in whose hands **the leases cannot be taxed either directly or vicariously,**" and it must inevitably follow, therefore, that the income from these leases cannot be taxed by the State of Oklahoma. If the State of Oklahoma could tax this income, and thus indirectly tax these leases, it would be in violation of every postulate, which we have so conclusively demonstrated and established, and it will be necessary for this Court to overrule every case it has thus far decided.

If the State of Oklahoma cannot take into consideration leases of this character in determining the value of the stock of a corporation, in exercising its powers of taxation, certainly it will not be permitted to directly reach and tax the income from these same leases. In other words, it resolves itself into the postulate as old as this Government of ours, that what cannot be done directly, cannot be accom-

plished indirectly. The State of Oklahoma by a play on words, by merely changing the phraseology, cannot reach a subject-matter of taxation, which it could not directly touch. Taking the principles of law, which have been so unqualifiedly announced by this Court in the cases, which we have heretofore cited, in connection with the Pollock Case *supra*, there is no escape from the proposition that the State of Oklahoma had no right to impose the taxes in question, and the final decision of the Supreme Court of Oklahoma must be reversed.

Having considered the case most directly in point, involving leases of the exact character as in the case at bar, we shall now call to the Court's attention the cases, commonly known as the "Gross Production Cases," all of which conclusively deny the right of the State of Oklahoma to impose taxes of the character now sought to be justified.

Mr. Justice Kane, in the opinion originally rendered in favor of the defendant and taxpayer, states the case correctly, where he says:

The parties agree that the Attorney General correctly states the question of law at issue in his brief as follows:

"The only question presented other than the one of penalties is whether or not the State is prevented from collecting income tax from leases on Indian lands under the supervision and approval of the Secretary of the Interior upon the same considerations which led the court to deny that right to the State in what

is known as the **gross production tax cases**, to-wit: *Choctaw & Gulf R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234; *Howard v. Gypsy Oil Co.*, 257 U. S. 504, 62 L. Ed. 1239; *Large Oil Co. v. Howard*, 248 U. S. 549, 63 L. Ed. 416."

This is the proposition, as presented by the Attorney General, in taking an appeal from an adverse decision by the District Court of Oklahoma County, Oklahoma, to the Supreme Court of that State.

Referring to these cases, and closing his opinion in favor of the defendant, and affirming the judgment of the Trial Court, the learned Justice said:

As we believe **those cases are controlling** on the question now under consideration, it follows that the judgment of the lower court must be affirmed.

We shall now call the Court's attention to these cases, and we believe it will conclude that, under their authority, the action of the Supreme Court of Oklahoma must be reversed, and the judgment of the District Court affirmed, as was done in the first opinion delivered by the Supreme Court of Oklahoma.

The question, therefore, is now sharply presented, as to whether or not the State can impose a tax upon the **net income** derived from such leases, when this Court has held that it cannot impose a like tax upon the **gross income** from the same source. The State has attempted by two different statutes, imposing taxes upon gross production, to reach the in-

come from this class of leases, and in each instance the right has been denied. It has usually been referred to as a "gross production" tax, but evidently in those statutes, the State was endeavoring to base a tax upon income, which was in those instances, the "gross income," while in the application of the present Income Tax Law, the State is attempting to reach the "net income," which in its last analysis, is nothing more than "net production." Our position, therefore, is that if the State cannot impose a tax on the "gross production," it cannot levy one upon the "net production," or, calling it by the name given by the statute, "net income."

It amounts in the end to but a change of terms used, and not to any difference in the subject-matter sought to be taxed. The State cannot, by using different terms, do indirectly what it cannot do directly.

In **Railroad Co. v Harrison**, 235 U. S. 292, 59 L. Ed. 234, a case which we shall later cite and quote from more fully upon the main question involved, this Court has stated the rule which it will follow, where it is said:

Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect.

In **Pollock v. Loan & Trust Co.**, 157 U. S. 429, the Court clearly laid down the rule, which must be

followed in determining the character and effect of a state tax as affecting Federal agencies and instrumentalities, saying:

If it be true that by **varying the form the substance may be changed**, it is not easy to see that **anything would remain of the limitations of the constitution**, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls as has indeed been established by repeated decisions of this court. Thus in **Brown v. Maryland**, 25 U. S. 12 Wheat. 419, 444 (6:678, 687), it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: "It is impossible to conceal from ourselves that this is **varying the form, without varying the substance**. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing."

The name of the tax, therefore, has but little significance in determining whether or not it can be imposed by the State of Oklahoma. It matters not whether it be called an "income tax" or a "gross production" tax, or a "net income" or a "net production" tax, it must ultimately be determined by its real "**nature and effect.**"

If the State, after its failure to sustain a "gross production tax," had enacted another statute, in and by which it had sought to avoid the effect of the decisions of the Supreme Court of the United States

in holding the "gross production" statutes void as to such leases, no one would contend that the State would have been in any more favorable position, if it had imposed it upon the "net production," instead of levying it upon the "gross production." And yet a tax upon "net income" is nothing more nor less than a tax upon "net production," for that is exactly what it is on last analysis. We believe it entirely beyond the power of the State, by legislative action or judicial interpretation, by the use of merely different names, to differentiate a tax, and impose it, when there has been merely a change in name and not in substance.

In **Railroad Co. v. Harrison**, 235 U. S. 292, 59 L. Ed. 234, there is found a case which, in principle decides the issues in favor of our contention. In that case, there was involved the former Gross Production Statutes of the State of Oklahoma, under which the State undertook to tax the gross receipts arising under and derived from a mining lease, covering restricted Indian lands. This Court unqualifiedly held the act of the State of Oklahoma invalid as applied to the receipts from the operation of such mines.

The Court held as follows:

The gross revenue tax imposed by Oklahoma, Act of May 26, 1908; Sec. 6, upon coal miners or producers equal to a specified percentage of the gross receipts from the total coal

produced, which shall be, in addition to the taxes levied and collected upon an ad valorem basis upon such mining property and the appurtenances thereunto belonging," is an occupation or privilege tax which cannot be exacted from a **Federal instrumentality** acting under congressional authority such as the corporate lessee, under the authority of the **Curtis Act** of June 28, 1898 (30 Stat. at L. 495, Chap. 517), of the coal mines upon segregated and unallotted lands belonging to the **Choctaw and Chickasaw Indian Tribes**.

The Court, stating the underlying facts as it proceeded with its opinion, said:

By an original bill filed July 19, 1909, in the Circuit Court of the United States, Eastern District of Oklahoma, appellant sought to enjoin the sheriff of Pittsburg County, from collecting taxes claimed by the State upon the **gross sales of coal dug from mines belonging to the Choctaw and Chickasaw Indians, which it leased and operated**. The claim was based on the Oklahoma statute which provides for a **gross revenue tax**; and was resisted upon the ground (among others) that in reality the demand was for an occupation or privilege tax to which the appellant could not lawfully be subjected, because, as a **Federal instrumentality** acting under congressional authority, it had leased and was operating mines to which the **Indians held title**. A general demurrer was sustained, and the cause is here by direct appeal.

No objection has been interposed to the form selected or the procedure adopted. * * *

Appellant is a railroad corporation with the power to lease and operate coal mines. In

the region formerly known as Indian Territory—now within the State of Oklahoma—the **Choctaw and Chickasaw Indians**, as wards of the United States, own a large area of segregated and unallotted lands containing valuable coal deposits which are not subject to taxation by the State. * * *

The Act of Congress, approved June 28, 1898 (30 Stat. at L. 495, 510, Chap. 517), "Curtis Act," ratified, confirmed and put into effect the Atoka Agreement of April 23, 1897, between the United States and the Choctaws and Chickasaws, which provided that their coal lands should remain common property of the members of the Tribe; that the revenue derived therefrom should be used for the education of their children; that the mines thereon should be under the supervision and control of two trustees appointed by the President, and subject to the rules prescribed by the Secretary of the Interior; that all such mines should be operated and the royalties paid into the treasury of the United States; that the royalty should be 15 cents per ton, with power in the Secretary of the Interior to reduce or advance the same according to the best interests of the Tribes; and that all lessees should pay fixed sums as advanced royalties.

In harmony with the provisions of the Curtis Act, appellant secured from the duly appointed trustees leases of certain mines, obligating itself to take out annually specified amounts of coal, and to pay the stipulated royalty. It proceeded actively to develop these, either directly or through its agent, and for some years before the present suit was begun took therefrom large quantities of coal, and fully complied with the obligations assumed.

Section 6 of the Oklahoma Statute, approved May 26, 1898, entitled, "an act providing for the levy and collection of a **gross revenue tax from** * * * persons, firms, corporations and **associations engaged in the mining or production of coal,** * * * provides: Every person, firm, association or corporation, engaged in the mining or production, within the state of coal * * * shall, within thirty days after the expiration of each quarter annual period expiring respectively on the first day of July, October, January and April of each year, file with the state auditor, a statement under oath, on forms prescribed by him, showing the location of each mine * * * operated by such person, firm, association, or corporation, during the last preceding quarter annual period the kind of minerals * * * the gross amount thereof produced; **the actual cash value thereof** * * * and shall, at the same time, pay to the state treasurer a "gross revenue tax," which shall be in addition to the taxes levied and collected upon an **ad valorem** basis upon such property and the appurtenances thereunto belonging, "**equal to 2 per centum of the gross receipts from the total production of coal therefrom.**" * * * An amendment of March 27, 1909, changed the quarterly periods and reduced the rates on receipts to one-half of one per centum.

Appellants furnished the auditor with a statement of the output of the mines operated, but declined to pay the tax assessed upon the gross receipts from sales. Thereupon, the sheriff, under directions of the auditor, was about to enforce the demand by a levy, and the present bill was filed to restrain him.

From the foregoing it seems manifest that the agreement with the Indians imposed upon

the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is to be carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. * * * But it is insisted that the statute, rightly understood, prescribes only an *ad valorem* imposition on the personal property owned by the appellant—the coal at the pit's mouth—which is permissible, according to many opinions. * * *

The court below held that the effect of the act was to lay a valid tax on personalty and the same result was subsequently reached by the Supreme Court of Oklahoma, **McAlester-Edwards Coal Co. v. Trapp**, 43 Okla. 510, 141 Pac. 794. The United States Court for the Western District of Oklahoma arrived at a different conclusion. **Missouri, K. & T. R. R. Co. v. Meyer**, 204 Fed. Rep. 140.

Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. **Galveston, H. & S. R. R. Co. v. Texas**, 10 U. S. 217, 52 L. Ed. 1031, 1037; 28 Sup. Ct. Rep. 638.

It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty and to subject them to a uniform *ad valorem* tax. Its very language imposes a "**gross revenue tax** which shall be in addition to the taxes levied and collected upon an *ad valorem* basis." We cannot, therefore, conclude that the gross receipts were intended merely to represent the **measure** of the **value** of property liable to a general assessment—provision is made for determining that upon a different

basis. * * * The requirement is not an account of property owned on a given day, as is the general custom where **ad valorem** taxes are provided for, and as Oklahoma laws require; but the manifest **purpose is to reach all sales and secure a certain per centage thereof**—a method commonly pursued in respect to license and occupation taxes.

A tax upon a merchant's, manufacturer's, or miner's **gross sales** is not the same thing as one on his **stock treated as property**. * * * **In effect the Oklahoma act prescribes an occupation tax;** * * * and accepting as true the allegations of appellant's bill, we think it **cannot be lawfully subjected thereto**.

There cannot possibly be any difference between gross revenue tax and income tax, affecting the income derived from operations under oil and gas leases on like restricted Indian lands. If you cannot tax the emoluments received by the lessee under the term "**gross revenue**," you cannot accomplish the same result by merely calling the same thing an "**income tax**," or by calling it a tax on "**net income**."

The gross production tax in the case just considered was imposed "in addition to the taxes levied and collected upon such * * * property and appurtenances thereunto belonging." It was urged that the real effect of the statutes was to make it a tax upon personal property, and it was thus sought to evade the objections to the act. Doubtless, on account of some remarks made by the Supreme Court in disposing of the case, the legislature passed the

statutes now in force, making the **gross production tax in lieu of all other taxes**, and sought again to enforce it as to the gross production or revenue derived from oil and gas leases.

After the passage of this new legislation, the Gypsy Oil Company, The Indian Territory Illuminating Company, the Okla Oil Company, and Barnsdall Oil Company, respectively, brought suits in the District Court of the United States for the Western District of Oklahoma to enjoin the collection of the gross production tax, as imposed by the new legislation, against E. B. Howard, then state auditor of the State of Oklahoma. The District Court sustained these injunctions and prevented the collection of the taxes. These cases were appealed to this Court by the State Auditor, and in a memorandum opinion of the Supreme Court, reported in 247 U. S. 62 L. Ed. 1239, in the cases of "E. B. Howard, as auditor of the State of Oklahoma et al., appellants vs. Gypsy Oil Company (No. 245); E. B. Howard, as auditor of the State of Oklahoma et al., appellants vs. Indian Territory Illuminating Oil Company (No. 246); E. B. Howard, as auditor of the State of Oklahoma et al., appellants vs. Okla Oil Company (No. 247); and E. B. Howard, as auditor of the State of Oklahoma et al., appellants vs. Barnsdall Oil Company (No. 248)," it was held that this last Gross Production Tax Law of the State of Oklahoma was **absolutely void**, as applied to leases upon restricted Indian lands giving a decision controlling in the

matter now under consideration. This Court considered the matter so plain, that it did not seem to think it necessary to write the usual opinion, but handed down merely a memorandum opinion, citing the Harrison case, *supra*, and one other case, to which we shall later call attention.

The memorandum opinion of this Court is as follows:

May 6, 1918, *per curiam*: Judgment affirmed with costs upon authority of **Choctaw, O. & G. R. Co. v. Harrison**, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27; **Indian Territory Illuminating Oil Company v. Oklahoma**, 240 U. S. 522, 60 L. Ed. 279, 36 Sup. Ct. Rep. 453.

In **Large Oil Company v. Howard**, 248 U. S. 549, 63 Ed. 416, the same case *supra*, involving the **Gross Production** tax of this State came before the Supreme Court of the United States and that court again, without writing an opinion, adhered to its former rulings, and reversed the holding of this court.

The memorandum opinion of the Court is as follows:

January 27 1919. *Per Curiam*: Judgment reversed with costs, and cause remanded for further proceedings upon the authority of **Choctaw, O. & G. R. Co.**, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27; **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453. And see **Howard v. Gypsy Oil Co.**, 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426.

The two chief cases, cited by this Court in the determination of **Harrison v. Railroad**, *supra*, were **McCulloch v. Maryland**, heretofore cited in this Brief, and **Farmers & Merchants Savings Bank v. Minnesota**, 232 U. S. 516. This Court could see no distinction between the Harrison Case and the last case mentioned, and there is, and can be, no distinction between them in the principles to be applied. These two cases, therefore, are wrapped together, and the subsequent cases following the Harrison Case are likewise bound together, all fitting like a glove the case at bar, and demonstrating beyond all cavil that the State of Oklahoma is absolutely without any power to tax, directly or indirectly, closely or remotely, these leases or the income derived therefrom.

The Indian Territory Illuminating Oil Company and **Harrison Cases**, together with the five other cases of like import, resting upon them for decision, are really decisive of the instant case. But, since the Supreme Court of Oklahoma seems disposed to refuse to follow these cases, we feel justified in presenting this case to this Court quite fully, and are willing to accept the challenge, and demonstrate from every angle the error of the High Court of Oklahoma.

In **Farmers & Merchants Savings Bank v. Minnesota**, 232 U. S. 2516, 58 L. Ed. 706, just mentioned there is found a case which illustrates how far this

Court has gone, and will go, in denying the right of the State to tax, directly or indirectly, an instrumentality or agency of the Federal Government, and its principles are decisive of the case at bar.

In that case, the State sought to tax bonds issued by municipalities in the Indian Territory and in the Territory of Oklahoma. This Court held that this could not be done, and it was true, even after the two Territories had been changed into the State of Oklahoma, and notwithstanding that no obligation to pay the bonds was assumed by the New State formed from these Territories. Among other things, it was held as follows:

A State may not tax bonds issued by municipalities in the Indian Territory and in the Territory of Oklahoma as property in the hands of the holders, since this would be to tax the performance of a government function **by an instrumentality and agency of the Federal Government**, although the bonds may not have been guaranteed either by the United States or by the central government of the territory.

This Court said:

This writ of error brings under review a judgment of the Supreme Court of Minnesota (114 Minn. 95, 130 N. W. 445, 851), affirming the judgment of the lower court, in proceedings for the collection of taxes assessed against the plaintiff in error for the year 1908. Plaintiff in error is a savings bank, having no capital stock, and was taxable under §839 Revised Laws 1905, which provides for ascertaining the surplus remaining after deducting from its

assets (other than real estate, which is separately assessed) the amount of the deposits and of all other accounts payable; the surplus to be taxed as "credits." The Supreme Court of Minnesota held that this section imposes not a franchise but a property tax, and that the surplus of savings banks as thus determined is taxable property. This construction is not questioned here; perhaps it is not open to question.

Two Federal questions are raised:

First, the savings bank insisted in the state courts, and here renews the insistence, that certain bonds issued by the municipalities in Indian Territory and in the Territory of Oklahoma, amounting to about \$700,000. in value, should have been omitted from the list of its personal assets, **for the reason that bonds of this character are not taxable by the State.**

This question, although novel, is to be solved by the application of **principles long established.**

It was laid down by Mr. Chief Justice Marshall, speaking for the court in **M'Cullough v. Maryland**, 4 Wheat. 316, 436, 4 L. E. 579, 607, 608, that the State could not constitutionally impose taxation upon the operation of a local branch of the United States Bank, **because the Bank was an agency of the Federal Government, and the United States had no power by taxation or otherwise to hamper the execution by that government of the powers conferred upon it by the people.** The supremacy of the Federal Constitution, and the laws made in pursuance thereof, and the entire independence of the general government **from any control** of the respective states, were the fundamental grounds of that decision. The principle has

never been departed from, and has often been reasserted and applied.

State taxation of national bank shares, as permitted by the Act of Congress, without regard to the fact that a part or the whole of the capital of the bank is invested in national securities which are exempt from taxation. * * * is apparent, not a real exception. The same is true of taxes upon the mere property of agencies of the Federal Government. * * * Indeed, these exceptions rest upon distinctions that were recognized in the decision of *M'Cullough vs. Maryland*, Chief Justice Marshall said, in closing the discussion. "This opinion * * * does not extend to a tax paid by the real property of the bank, in common with other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with other property of the same description throughout the State. But this is a tax on the operation of the bank, and is, consequently, **a tax on the operation of an instrumentality employed by the Government of the Union to carry its powers into execution. Such a tax must be unconstitutional.**"

After referring to the legislation of Congress relative to the government of the Territories, the Court further said:

In our opinion, therefore, the municipalities of the Territory of Oklahoma and of Indian Territory were **instrumentalities and agencies of the Federal Government, with whose operations the States were not permitted to interfere by taxation or otherwise;** and the issuance of municipal bonds was the performance of a governmental function, with-

in the established doctrine. And we deem it immaterial that these bonds were not guaranteed by the United States, or even (in the case of the Oklahoma bonds) by the central government of the Territory.

The Court further said:

But we deem it clear that a taxation upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. In *Weston v. Charleston*, 2 Pet. 449, 466, 468, 7 L. Ed. 481, 487, 488, which involved the right of the city, acting under the authority of the State of South Carolina, to ordain a tax upon the United States stock in the hands of the owner, Mr. Chief Justice Marshall, speaking for the court, after re-affirming the principles settled in *M'Cullough v. Maryland*, said (p. 468): "The American people have conferred the power of borrowing money on their Government, and by making that Government supreme, have shielded its action, in the exercise of this power, from the action of the local government. The grant of power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however, inconsiderable, it is a burden on

on the operations of the government. It may be carried to an extent which shall arrest them entirely."

The clear effect of the Income Tax Statutes of the State of Oklahoma, as applied to income derived from these leases on restricted Indian Lands is to impose an occupation or privilege tax on an agency of the Government of the United States, and it has been universally held that this cannot be done. This is the decision reached in the Gross Production Tax Cases, already, decided by this Court of the United States, and this Court held that the direct effect of the statutes then involved was "to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes." This is peculiarly true in imposing the tax upon the net income, as that is derived solely from the sale of oil and gas, less the deductible expenses allowed, and the income tax imposed reaches out and takes certain percentages of these sales, as represented by the net income.

In **Railroad Co. v. Harrison**, *supra*, speaking directly with reference to this, the Court said:

From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is to be carried into effect. **Such an agency cannot be subjected to an occupation or privilege tax.**

Further speaking of the manifest purpose of the Gross Production Statute, the Court said:

The manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes.

A tax upon merchant's, manufacturer's, or miner's **gross sales** is not the same thing as on his stock **treated** as property. * * * **In effect, the Oklahoma act prescribes an occupation tax;** * * * and, accepting as true the allegations of appellant's bill, we think, **it cannot be lawfully subjected thereto.**

But, even if the proposed income tax does not fall within the classification of an occupation or license tax, it is equally obnoxious and void as being unconstitutional. If it be held to be a property tax, as the Supreme Court of Oklahoma attempted to hold the Gross Production tax to be, then it is a tax upon the lease upon restricted lands, and it will be conceded that a direct tax cannot be imposed by the State of Oklahoma upon any leases of this character. So, whether we consider the tax on occupation or license tax, or one falling upon the leases, the State is equally without power to impose a tax.

The case of **Indian Territory Illuminating Oil Company v. Oklahoma, supra**, fully sustains the contention that, if the income tax should be held, with reference to the constitutional inhibition against a State, taxing or affecting by a tax, a Federal agency or instrumentality, not to be in the nature of

an occupation or license tax, but as one imposed upon the leases or property from which the income is derived, then it must be declared illegal and void. It is conceded that the State of Oklahoma cannot tax the leases themselves, and, under the authority of all the cases, which we have so far cited, it certainly cannot tax any value based upon that lease, and, unquestionably, it cannot reach further and tax the income derived from such leases. And when we take this case in connection with the Pollock Case, then the demonstration is complete, and there is no escape from the conclusion that the income involved is exempt from taxation by the State of Oklahoma.

The preceding cases, which we have cited under this Point, are bound together in an unbreakable bundle of judicial strength, shielding and exempting this income from taxation by the State of Oklahoma, and neither the resourceful ingenuity of the Legislature, nor the astuteness of the Supreme Court of Oklahoma, can ever bend, twist or break them as thus bound together, or as separate or single.

From these authorities, there is no escape from the conclusion that the State of Oklahoma cannot impose an income tax upon the income from these leases on these restricted Indian lands. The Indians are the wards of the General Government; the lands are held subject to the control of the United States. The leases are all made with the approval of the Secretary of the Interior, under elaborate and minute

rules and regulations, and the work of exploiting, maintaining and operating these leases is conducted under these rules and regulations, and the royalty, which is paid by the lessee is always first paid to the particular Indian agency having charge of the particular Indian and his lands, and is thereafter disbursed by such Agency. Every lease, therefore, on these restricted Indian lands is an instrumentality or contract by and through which the Government acts, and the lessee is a Federal agency in accomplishing the work for the Federal Government and its ward, the Indian. It matters not, therefore, whether the tax be considered in the nature of an occupation tax or license tax, or one upon the lease, or a tax different in nature from any of these, as the lease itself cannot be taxed, neither can the income derived therefrom. In determining the character of the tax in relation to the taxing power of the State, as affected by the Federal Constitution, the tax partakes of the nature of all these taxes, but, whichever one may be held to be applicable, there is but one result, and that is that the income tax statutes of Oklahoma cannot apply to those leases upon restricted Indian lands, and if held to embrace them, as to such, must be declared and held unconstitutional. The result would clearly be interfering with and burdening the operations of the Federal Government.

This Court in the Pollock case has held, as we have shown, that the Congress of our own Govern-

ment, cannot, by indirection, impose a tax which the constitution forbids it to directly place.

It was conceded that the Federal Government could not directly tax either the lands, the personal property, or the municipal bonds involved, but it was sought to change the name of the tax, impose it upon the income derived from these sources, and thus circumvent the plain constitutional provisions. It is equally as plain that the State of Oklahoma, without the consent of Congress, and which has not been given, **cannot tax the leases existing upon these restricted Indian lands**, and, if that be true, then the State cannot by merely changing the name of the tax, and by indirection, **impose a tax upon these sources of income**, without violating the constitutional provisions against such action, which have so universally been held to apply in the same and similar circumstances. The Pollock case is directly in point and completely demonstrates that the State of Oklahoma **is absolutely without power** to tax income from leases on restricted Indian lands, and consequently, cannot impose the particular taxes now sought to be charged against the taxpayer.

From the cases which we have cited, there can be no question but that defendant, as a lessee of the restricted lands of Jackson Barnett, a citizen and member of the Creek Tribe or Nation of Indians, and as the lessee of the lands of the Osage Tribe or Nation of Indians, is an instrumentality of the

Government of the United States through which its obligations to these Indians, its wards, are to be carried into effect. The Government has assumed a definite obligation to these Indians, has been for years discharging the same, and will continue to do so in the future. The defendant taxpayer is as much such an instrumentality as an officer or employe of the United States is, and the emoluments received as a consequence of the leases, is as much under the protection of the constitution of that Government as the salary or compensation of such an officer or employe. It is the duty of the Federal Government to exploit and develop these oil and gas lands of its wards, and no one doubts but that it could compensate itself as the guardian of its wards. Instead of doing this itself, it has adopted the plan disclosed by the record in this case, and has made the lessees its agents, means or instrumentalities in discharging its constitutional and governmental functions growing out of its obligations and duties to its Indian wards, and has provided for the emoluments or compensation which they shall receive. It has provided Indian agencies, maintained at great expense, as arms of the Interior Department, to supervise and act with these lessees. It pays the Indian agents and superintendents, and other employes in the Indian agencies and Interior Department salaries for their compensation, and to the lessees, after deducting the royalties, whatever proceeds they may have after the royalty is paid, and

they have borne the expense of development and operation, as their emoluments or compensation as the agents or employes of the Federal Government. They are as much in the employment of the Federal Government, and are as much discharging its functions as the various superintendents of the various Indian agencies. For instance, a superintendent and large force are necessary at the Osage Agency at Pawhuska. Would anyone say that the State could tax the salary of that superintendent or any of the employes under him?

The question has been squarely passed upon by the Supreme Court of the United States, and it has been held that a state has no power, right or authority to tax the income of such an officer or employe of the United States Government, and also that the Federal Government is equally without power to tax the income of such an officer or employe of the state. These cases are exactly in point, and are controlling on the primary question now in issue.

In **Harrison v. Railroad Co.**, *supra*, where a similar situation existed, the Supreme Court of the United States said that "it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and the appellant is the instrumentality through which this obligation is to be carried into effect." The

same is true in all the leases now under consideration. The income, which the lessee derives from the lease, is the **compensation** which the Federal Government allows to its agent or instrumentality, by means of which it has employed him to thus discharge its duty to the Indians. If the income, therefore, of an ordinary employe of that Government cannot be taxed by the state, then the income of this special employe or agent of the Government likewise cannot be taxed.

In the early and leading case of **Osborn v. Bank**, 9 Wheat. 739, in which the doctrine that the States cannot in any manner affect the instrumentalities of the National Government by taxation, this Court recognizes that the compensation of a Federal Agent need not be a specific salary or amount, paid by the Government from its treasury, but may consist of the profits of a business, or an enterprise engaged in by such Agent through his employment by the Government as such, as in the case at bar.

The State, in seeking a revision of the **McCulloch Case**, *supra*, to sustain the validity of the Statutes of Ohio imposing the tax, made the following contention:

The foundation of the argument in favor of the right of a state to tax the bank, is in the **supposed character** of the institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract be-

tween individuals, having private trade and private profit for its great end and principal object.

There was an attempt to distinguish between the private business and trade conducted by the Bank, and its agency for the Government, but this distinguishment was not allowed to affect the result in the case. It was also contended that congress had not, by the act of incorporation, created the faculty of trading in money, and that, therefore, the State could regulate this function of the Bank. This Court, however, denied any power in the State to thus touch one of its agencies and instrumentalities, and held, when the faculties, as there expressed, were bestowed by the United States upon either a corporation or an individual, each would be protected from any encroachment of the States.

Referring to the first distinction noted, this Court said, beginning on page 862:

This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other.

It is urged that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company as well as by a corporation. As this profession or business may be taxed, regulated, or restrained by an individual, it may likewise be taxed, regulated,

or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the Court is alone to be considered. We do not maintain that the **corporate character** of the bank **exempts** its operations from the action of state authority. **If an individual were to be endowed with the same faculties for the same purposes, he would be equally protected in the exercise of those faculties.** The operations of the bank are believed **not only to yield the compensation for its services to the Government,** but to be **essential** to the performance of those services. Those operations give its value to the currency in which all the transactions of the Government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the Nation for which it was created, and are, therefore, **of the very essence of its character, as national instruments.** The business of the bank constitutes its capacity to perform its functions, **as a machine for the money transactions of the Government.** Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Drawing down more closely to the character of the compensation, the Court continued:

Were the Secretary of the Treasury to be authorized by law, to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, **the operations of those agents would be**

as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created, filled by a person who should receive as compensation for his time, labor and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, would each State in the Union possess a right to control these operations? The question on which this right would depend must always be, are the faculties so essential to the fiscal operations of the Government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist, must always be answered in the affirmative.

The defendant, therefore, in the present case, falls clearly within this case in every respect. The income he receives from these leases, after all expenses are paid, is the compensation which he received from the Government, and is as much a salary of compensation as the salary of the Secretary of the Treasury, or of the Interior, or even the President of the United States, and as much shielded and protected, by the National Constitution from any taxation by any State. The income from these leases, therefore, is equally protected from its inherent nature, as directly received from the United States, irrespective of the fact it also flows from a non-taxable source.

In the case of **Dobbins v. Erie County**, 16 Pet. 435, 10 L. Ed. 1022, the question was squarely de-

cided that a State cannot tax the income of an officer employee of the United States.

This Court, with a full discussion of the underlying principles, and clearly stating fundamental doctrines, which sustain us in this respect, said:

The assessment was made by the commissioners of Erie County under the Act of Pennsylvania of the 15th April, 1834. It is believed to be the only instance of a tax being rated in that state upon the office of an officer of the United States. It has, however, received the sanction of the Supreme Court. If it can be lawfully done, it cannot be doubted that similar assessments will be made under that law, upon all other officers of the United States in Pennsylvania. The language of the court is: **"The case is put on the power and right to impose the tax.** In other words, is this a **legitimate subject** of taxation? Perhaps this may in some measure depend on whether, within the true meaning of the acts, it is the office itself, or the **emoluments** of the office which are made the subjects of taxation." In the preceding extract, we gave the language of the court. The law is that an account shall be taken of "all offices and posts of **profit.**" The next section makes it the duty of the assessors "to rate all offices and posts of profit, professions, trades, and occupations, at their descretion, having a **due regard to the profits arising therefrom.**"

The **emoluments** of the office, then, are taxable, and **not the office.** But **whether it be one or the other,** we cannot perceive how a tax upon either conduces to comprehend within the terms of the act the office or the compensation of an officer of the United States.

It will not do to say, as it was said in argument, that though the language of the act may import that offices and posts of profit were taxable, that it was the **citizen** who holds the office whom the law was intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed, and the protection received from government; and then that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.

The first answer to be given to these suggestions, is that the tax is to be levied **upon a valuation of the income** of the office. But, besides, the obligations upon persons to pay taxes is mistaken, and the sense in which a tax is a personal charge is misunderstood. The foundation of the obligation to pay taxes is not the privilege enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed as well by those members of a state who do not, because they are not able to pay taxes, as by those who are able and do pay them. Married women and children have privileges and protection, but they are not assessed, unless they have goods or property separate from the heads of families. The necessity of money for the support of states in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is that it is assessed upon personal estate and the profits of labor and industry. It is called a personal charge to distinguish such a tax from the tax upon the lands and tenements which are enforced without any regard to the persons who are the owners. Taxes are never assessed, un-

less it be a capitation tax, upon persons, as persons, but upon them on account of their goods and the profits made upon professions, trades and occupations. They are so imposed because public revenue can only be supplied by assessments upon the goods of individuals—"comprehending under the word 'goods' all the estate and effects which everyone hath of whatsoever sort they be. Taxes regard the persons of men only because of their goods." The goods, then, are taxed, and not the person. But those who are to pay the tax are taxable persons, because they are under an obligation to contribute from their means to the necessities of the state. The obligation, however, only becomes a charge upon the person in consequence of the power in the state to enforce the payment of taxes by coercion. This power extends to the sequestration of the goods, and the imprisonment of the delinquent. A tax, according to the object upon which it is laid, may be a personal charge; but that is a different thing from its becoming a charge upon the person in consequence of the coercion which may be provided by law to enforce the payment.

We have been more particular in noticing this argument, because it enabled us to put the point upon which it was intended to bear upon right principles. Besides, as it was drawn from the statutes of Pennsylvania, it implied the supposition that her legislature, in those enactments upon taxation, had disregarded those principles. But this is not so. If the occasion was a proper one for this court to do it, we might easily show that the act throughout was framed upon an enlightened recognition by the legislature of that state of all the principles upon which taxes are imposed. The only difficulty in the act has arisen from the terms di-

recting assessments to be made upon **all offices and posts of profit**, without restricting the assessments to offices and posts of profit held under the sovereignty of that state and **not excluding them from being made upon offices and posts of profit of another sovereignty—the United States.**

The case being now cleared of other objections, except such as relate to the unconstitutionality of the tax, we will consider the real and only question in it; that is, "whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies."

It is not necessary for the decision of this question that the power of taxation in the states, and in the United States, under the constitution of the latter, should be minutely discussed.

Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a state. **But in our system there are limitations upon that right.** There is a concurrent right of legislation in the states and the United States, except as both are restrained by the constitution of the United States. Both are restrained upon this subject by express prohibitions in the constitution; and the states, by such as are necessarily implied when the exercise of the right by a state conflicts with the perfect execution of another sovereign power delegated to the United States. **That occurs when taxation by a state acts upon the instruments, emoluments and persons, which the United States may employ as necessary and proper means to execute their sovereign powers.** The Government of

the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the constitution are in Congress. Taxation is a sovereign power in a state; but the collection of revenue by imposts upon imported goods, and the regulation of commerce are also sovereign powers in the United States. Let us apply, then, the principle just stated, and the powers mentioned, to the case in judgment, and see what will be the result.

Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce with foreign nations and among the several states, and **with the Indian Tribes**. Neither can be done without legislation. A complicate machinery of forms, instruments and persons must be established; revenue districts were to be designated; collectors, naval officers, surveyors, inspectors, appraisers, weighers, measurers and gaugers must be employed; "the better to secure the collection of duties on goods and on the tonnage of vessels." Revenue cutters, and officers to command them are necessary. The latter are declared to be officers of the customs, and they have large powers and authority. All of this is legislation by Congress to execute sovereign powers. **They are the means necessary to an allowed end**; the end, the great objects which the constitution was intended to secure to the states in their character of a nation. Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a state, because they are means. **Is not the officer more so**, who gives use and efficacy to

the whole? **Is not compensation the means by which his services are procured and retained?** It is true it becomes his when he has earned it. If it can be taxed by a state as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? Could Congress use an uncontrolled discretion in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the state legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the states would be different. To allow such a right of taxation to be in the states, would also in effect be to give the states a revenue out of the revenue of the United States, to which they are not constitutionally entitled, either directly or indirectly, neither by their own action, nor by that of Congress. The revenue of the United States is intended by the constitution to pay the debts and provide for the common defense and general welfare of the United States, to be expended, in particular, in carrying into effect the laws made to execute all the express powers, "and all other powers vested by the Constitution in the Government of the United States." But the unconstitutionality of such taxation by a state as that now before us may be safely put (though it is not the only ground) **upon its interference with the constitutional means** which have been legislated by the Government of the United States to carry into effect its powers to lay and collect taxes, duties, imposts, etc., and to regulate commerce. In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland in the case of **M'Cullough**

(4 Wheat. 316), and the tax by the city council of Charleston, in **Weston's** case (2 Peters, 449); in both of which it was decided by this court that the state governments cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers.

But we have said that the ground upon which we have just put the unconstitutionality of the tax in the case before us, is not the sole ground upon which our conclusion can be maintained. We will now state another ground, and we do so because it is applicable to exempt the salaries of all officers of the United States from taxation by the states.

The powers of the National Government can only be executed by officers **whose services must be compensated by Congress**. The allowance is in its discretion. The presumption is that the compensation given by law is **no more than the services are worth**, and only such in amount as will secure from the officer the **diligent performance of his duties**. "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve," without that recompense being in any way lessened, **except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the subjects of taxation**, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation **by the sovereignty who has a power to impose it**, and which is intended to bear equally upon all according to their estate.

The compensation of an officer of the United States is fixed by a law made by Congress. It is **in its conclusive discretion** to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a state upon the office, diminishing the recompense, **conflict with the law of the United States**, which secures it to the officer in its entirety? **It certainly has such an effect**; and any law of the state imposing such a tax **cannot be constitutional**, because it conflicts with a law of Congress made in pursuance of the constitution, and which makes it the supreme law of the land.

We particularly call the attention of the Court to the fact that the Court considered **"that the act throughout was framed upon an enlightened recognition by the legislators of that state of all the principles upon which taxes are imposed."** In other words, if there had been a proper exercise of the taxing powers by the state, the act would have the full approval of the Court, both upon legal principles and the fairness of the legislation, and that the Court was constrained to hold the act invalid solely upon the absolute lack of power in the state to tax the subject-matter.

In **Buffington v. Day**, 11 Wall. 113, 20 L. Ed. 122, the Supreme Court of the United States held that likewise the Federal Government was without constitutional power to tax the income of an officer of the states.

The Court said:

In the case of **Dobbins v. Erie Co.**, 16 Pet. 435, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer **was a means or instrumentality employed for carrying into effect some of the legitimate powers of the Government, which could not be interfered with by taxation or otherwise by the states**, and that the **salary or compensation** for the service of the officer **was inseparably connected** with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reason, equally exempt.

In **Purnell v. Page**, 133 N. C. 126, 45 S. E. Rep. 534, the Supreme Court of North Carolina reached the same result, where it held that an income tax could not be imposed upon the salary of a Federal judge. The Court said:

It has been so long and so well settled by the **Highest Federal court**, that no state can tax the compensation allowed by the Federal Government to its officers that it had not been thought that the point could again be raised. **Dobbins v. Erie County**, 16 Pet. 435, 10 L. Ed. 1022; **King v. Hunter**, 65 N. C. 412, 6 Am. Rep. 754. In **Collector v. Day**, 11 Wall. 1113, 20 L. Ed. 122, it is said: "In **Dobbins v. Commissioners of Erie County**, it was decided that it was not competent for the legislature of a state to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed **mainly upon the ground that the**

officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation, or otherwise, by the states; and that the salary or compensation for the services of the officer was inseparably connected with the office; that, if the officer as such was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt." In that case the court held that for the same reason the United States Government is prohibited from taxing the salary of the officers of a state government. As the power of a state to tax is limited only by a restriction, if any, in the state constitution, and there is none in ours, as to the income tax, which can be levied at any rate the legislature sees fit, if only it is uniform for each class, and of this classification the legislature is the judge, it follows, that if the general assembly can tax the income of Federal officers, they could tax them to be unprofitable, in short, tax them out of existence, as the United States did state banks of issue.

The Court notes the very fundamental reason for denying the power of the state to tax the income of the Federal agencies and instrumentalities, where it is said, in effect, that if the state could tax them at all, it could tax to the limit, and "could tax them to be unprofitable, in short, tax them out of existence."

In **Evans v. Gore**, 253 U. S. 245, in view of the preceding authorities, which we have cited, supports fully our contention.

The constitutional prohibition against a State taxing at all the salary or compensation of an officer, employee, instrumentality or agent of the United States Government is not stronger than that against diminishing the salary of a Judge of one of the courts of the United States. If Congress cannot override this prohibition as to the Federal Judges, how can the State of Oklahoma trample the other, enforced just as rigidly against the States, and reach the compensation or emoluments of the lessee in these leases on restricted Indian lands?

Under the authorities, which we have cited, the defendant, as the lessee in the leases involved, is as much in the employment of the United States as was the learned Judge, whose salary was sought to be taxed, and his compensation and emoluments, although measured by a different method, and paid in a different manner, are as much under the protection of the Constitution of the United States against taxation by the States as was the salary of the Judge of one of the Courts of our country.

Sustaining the decision and result on several cases heretofore cited by us, this Court said, beginning on page 254:

Only by subordinating substance to mere form could it be held that his compensation was not diminished. Of course, the conclusion that it was diminished is the natural one. This is illustrated in **Dobbins v. Erie County**, 16 Pet. 435, 450, 10 L. ed. 1022, 1027, which involved a

tax charged under a law of Pennsylvania against a revenue office of the United States who was a citizen and resident of that state. The tax was adjusted or proportioned to his compensation, and the state court sustained it. (7 Watts, 513.) In reversing that decision, this court, after showing that the compensation had been fixed by a law of Congress, said: "Does not a tax, then, by a state upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a state imposing such a tax cannot be constitutional."

But it is urged that what the plaintiff was made to pay back was an income tax, and that a like tax was exacted of others engaged in private employment.

If the tax in respect of his **compensation be prohibited**, it can find no justification in the **taxation of other income as to which there is no prohibition**; for, of course, doing what the Constitution permits **gives no license to do what it prohibits**.

The prohibition is general, contains no excepting words, and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here

recognize and sustain, is well settled. In **Collector v. Day** (**Buffington v. Day**) 11 Wall. 113, 20 L. ed. 122, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in **Pollock v. Farmers' Loan & T. Co.**, 157 U. S. 429, 585, 601, 652, 653, 39 L. ed. 759, 820, 826, 844, 15 Sup. Ct. Rep. 673, it was held—the full court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a state or any of its counties or municipalities; and in **United States v. Baltimore & O. R. Co.**, 17 Wall. 322, 21 L. ed. 597, there was a like holding as to municipal revenues derived by the City of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any **express prohibition** in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the **independence of the states within their own spheres**.

In the case just cited, the constitutional prohibition was invoked to protect merely one of the three great branches of our Government, the judiciary. The constitutional prohibition, however, which we are now invoking, is one which, as between the States and the Federal Government, protects each of them from any encroachment whatever on the part of the other. We unhesitatingly submit, therefore, that this Court should not pause one moment in sustaining the one general, not expressed, but most important, prohibition in the Constitution of the United States, which says to every State in the Union, you cannot intrench upon

the sovereignty of the National Government, and this great Court, the tribunal of all the people and States of this Country, will not permit the Federal Government to encroach upon your equally sacred sovereignty.

In **United States v. Railroad Co.**, 17 Wall. 322, 21 L. ed. 599, there is found a case which clearly states the underlying principles to be applied in the case at bar, and shows the reciprocal positions which the United States and the various States sustain to one another in the matter of taxation.

In this case, the City of Baltimore, with a view to its commercial prosperity, was desirous of aiding in the construction of a railway, by which the commerce and business of the Western States would be brought to that City. For this purpose, it was authorized by the Legislature to issue corporate bonds for Five Million Dollars, on which it was to obtain the money. The proceeds of these bonds, reserving ten per centum as a sinking fund, were to be paid to the Railroad Company. To secure the City against loss, and to provide for the payment of interest on the bonds of the City, as it should, from time to time, mature, and of the principal, when payable, the Railroad Company executed a mortgage to the City upon its road and franchises and revenues. The United States sought to recover an income tax on these bonds or mortgage, and this Court emphatically held that it could not

do so, for the reason that the Federal Government could not tax the income of this municipal corporation, a part of the State Government, notwithstanding the fact that the investment partook of the nature of a private enterprise.

The Court said:

There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the Act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their 'own affairs through their legislative, executive and judicial departments, in their own manner **through their own agencies**, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it an exemption of those agencies and instruments, **from the taxing power** of the Federal Government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, **if any interference is permitted**. Hence, **the beginning of such taxation is not allowed on the one side, is not claimed on the other**.

Before closing this proposition, let us now consider a few, of the many cases, which carry with them the distinction as to the imposition of a tax, which may remotely affect interstate commerce, which we shall later more particularly consider, and a tax which is on a means employed by

the Government of the United States to execute its constitutional powers. The learned Attorney General has so far endeavored to rest the case of the State upon the decisions of this Court, permitting profits from interstate commerce to be included in imposing the State Income Statutes. This Court, however, has always distinguished between such subject matters, and has always held that **no tax**, however slight, may be constitutionally imposed on such a means employed by the Federal Government in exercising its constitutional power.

In **Western Union Telegraph Co. v. Texas**, 105 U. S. 460, 26 L. ed. 1067, the State of Texas undertook to tax the messages sent from points within the state to other points therein, from points within the State to points in other States, and messages which were sent by the Government under its contract with the Telegraph Company. This Court, separating the messages into three distinct classes, held that the State could tax those wholly within the State, but could not those passing out of the States, because of being an interference with interstate commerce, and could not tax those sent by the Government, because it would be tax on the means employed by the Government to execute its constitutional powers. If the Government cannot tax the income received for a telegraph message, surely it cannot tax the income received for operating these leases, as shown in the case at bar;

The Court said:

The Western Union Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a **government agent for the transmission of messages on public business**. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is, whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent **by public officers on the business of the United States**.

In State Freight Tax Case, 15 Wall, 232 (82 U. S. XXI. 146), this court decided that a law of Pennsylvania requiring transportation companies doing business in that State to pay a fixed sum as a tax "on each two thousand pounds of freight carried," without regard to the distance moved or charge made, was unconstitutional, so far as it related to goods taken through the State, or from points without the State to points within, or from points within to points without, because to that extent it was a regulation of foreign and interstate commerce. In this the court but applied the rule, announced in **Brown v. Maryland**, 12 Wheat, 444, that when the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. In that case, it was said, a tax on the sale of an article, imported only for sale, was a tax on the article itself. To the same general effect are **Welton v. Missouri**, 91 U. S. 275 [XXIII. 347]; **Cook v. Pennsylvania**,

97 U. S. 566 [XXIV 1015], and **Webber v. Virginia** [ante, 565]. And in *Passenger Cases*, 7 How. 283; **Crandall v. Nevada**, 6 Wall. 35 [73 U. S. XVIII. 745] and **Henderson v. Mayor of N. Y.**, 92 U. S. 259 [XXIII. 543], taxes upon passenger carriers of a specific amount for each passenger carried were held to be taxes on the passengers; and in *State Tonnage Cases*, 12 Wall., 204 [79 U. S. XX. 370]; **Peete v. Morgan**, 19 Wall. 581 [86 U. S. XXII. 201]; **Cannon v. New Orleans**, 20 Wall. 577 [87 U. S. XXII. 417], and **Steamship Co. v. Tinker**, 94 U. S. 238 [XXIV. 118], that taxes on vessels according to measurement, without any reference to value, were taxes on tonnage.

The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one half cent. Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. That is fully established by the cases already cited. **As to the government messages, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers and,**

therefore, void. It was so decided in **McCulloch v. Maryland**, 4 Wheat. 316, and has never been doubted since.

In the fairly recent case of **Williams v. Talladega**, 226 U. S. 404, 57 L. Ed. 275, the distinction which we are claiming between merely interstate commerce, and a tax indirectly affecting it, and a tax which bears directly on the compensation of Federal agent or instrumentality, is again shown, and fully sustains every contention of the defendant in the case at bar.

In this case, an ordinance of the City of Talladega, Alabama, was attacked on the grounds that, as the Telegraph Company had accepted the provisions of the Act of Congress of July 24, 1866, the tax imposed by the City was one upon a franchise granted by the United, and also was a tax, which burdened and interfered with interstate commerce, and also resulted in taxing messages sent by the Government of the United States, under its contract with the Telegraph Company. This Court denied every other contention as to the invalidity of the law, including that based upon interstate commerce, but declared the entire ordinance void, because it included messages sent by the agents and employees of the Government of the United States, thus clearly demonstrating that, where income or compensation is received either directly or indirectly from that Government, no tax imposed by the States, affecting the same in the least, can be sustained.

The Court, disposing of the contention that the ordinance violated the interstate clause, beginning on page 416, said:

It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the state to determine. It is contended that the result of the tax upon intrastate business conducted at a loss is to impose a burden upon the other business of the company, and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of 86 cents, is not sufficiently accurate representation of the business of the Company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that **the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right.**

While the Court refused to hold the ordinance void, on account of its effect on the interstate commerce of the Telegraph Company, yet, when the question of imposing the tax upon the Government messages is reached, this Court emphatically held that the receipts from such messages, or such messages, could not be affected by the tax, and held the entire ordinance void because it included such messages.

With reference to this contention, and disposing of the same, this Court said, beginning on page 417:

It is further contended that this ordinance is void because it **makes no exception as to the sending of government messages**. In this respect it is suggested in the brief of the defendant in error that the ordinance may be construed as not to include business transacted by the company **as an agency of the government**, and as applying only to commercial business of a different character; but, in view of the construction which the Supreme Court of Alabama has placed upon it, we must consider the ordinance as construed by that Court. Upon the authority of a previous case (**Moore v. Eufaula**, 97 Ala. 670, 11 Sp. 921), it held the ordinance valid, although it does not exclude messages sent for the Government of the United States.

In this connection it said:

“The fact that a part of the business done by the company consists in the sending of messages for the Government does not affect the right of the State to impose a reasonable privilege tax.”

We, therefore, have to consider whether a license tax by a State on doing business within the State, **including the transmission of government messages, by a telegraph company which has accepted the terms in the act of 1866, can be lawfully imposed**. By the act of 1866, government messages are given priority over all other business, and transmitted at the rates fixed by the Postmaster General; and before the telegraph companies exercise any of the powers or privileges conferred by the law, they are required to file with the Postmaster General their written acceptance of the restrictions and obligations of the act (Rev. Stat. §§5266 and 5268, U. S. Comp. Stat. 1901, pp. 3580, 3581).

This court has had occasion to consider the effect of this legislation and the acceptance of its terms by the telegraph company, so far as the transmission of government telegrams and the transaction of government business is concerned. In the case of **Western U. Teleg. Co. v. Texas**, 105 U. S. 460, 26 L. Ed. 1067, an ordinance was held void which required the company to pay a tax of 1 cent for all full rate messages sent, and 1-2 cent for every message less than full rate. This was in addition to taxes paid by the company on real and personal property in the State. The ordinance was held void as levying a tax upon interstate messages, and also void insofar as it undertook to **tax the transaction of government business**. After declaring that as to such business, the companies which had accepted the terms of the act, **became government agencies**, this Court, speaking by Mr. Chief Justice Waite, said:

"The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position **of an instrument** of foreign and interstate commerce, and **of a government agent for the transmission of messages on public business**. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way **on account of its occupation and its business**. The precise question now presented is whether the power to tax its occupation can be exercised **by placing a specific tax on each message sent out of the States, or sent by public officers on the business of the United States.**"

After dealing with the interstate commerce feature of the law, the Court said:

"As to the government messages, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and, therefore, void. It was so decided in **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, and has never been doubted since.

The Ordinance sustained in **Postal Teleg. Cable Co. v. Charleston**, 153 U. S. 692, 38 L. Ed. 871, expressly excluded interstate and government messages.

Were it otherwise, an agency of the Federal Government in the execution of its sovereign power, would be at the mercy of the taxing power of the State. It is enough, in this connection, to refer to the cases of **M'Culloch v. Maryland**, *supra*; **Osborn v. Bank of the United States**, 9 Wheat. 738, 6 L. Ed. 204; **California v. Union P. R. Co.**, 127 U. S. 1, 32 L. Ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; **Central P. R. Co. v. California**, 12 U. S. 91, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766.

We have, then, an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business; communication between the officers and departments of the Federal Government. The ordinance, making no exception of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license exacted necessarily affects the whole, and makes the tax unconstitutional and void.

This case, and that of **Telegraph Co. v. Texas**, *supra*, clearly show the vast distinction between income derived from interstate commerce, and that de-

rived from leases of the character involved here. This Court will permit a certain latitude in the taxation by a State, indirectly and not burdensomely affecting interstate commerce, but it will not sustain **any taxation whatever** touching or affecting the income or receipts paid to an agent of the Federal Government as compensation for his services as such. In the case last cited, this Court could find no reason for interfering with the ordinance, on the ground that it interfered with interstate commerce, but, inasmuch as it sought to tax or effect messages, messages sent by the Telegraph Company as an agent of the Federal Government, and on the business of that Government, it was emphatically held not only that this could not be done, but the fact it was done, invalidated the whole ordinance or act imposing the tax. There cannot possibly be any difference in a law which imposes a specific percentage on the amount of message sent for the Government, and an income tax which likewise imposes a specific percentage on the net income, of a Federal agent, in each instance alike transacting business for the Government of the United States.

These cases are exactly in point, and demonstrate, from another point of view, that there is an **absolute lack of power in the State of Oklahoma to tax income derived from these leases on Indian lands**. It is admitted that the leases themselves cannot be taxed. We have demonstrated that, since they cannot be directly taxed, they cannot be in-

directly subjected to taxation by imposing the tax upon the income; for, **where the source itself cannot be taxed, the income derived therefrom is equally exempt from taxation.** These cases, however, which we have immediately cited in the preceding pages of this Brief, draw this income even closer to the constitutional prohibition. They absolutely place the income, **as subject-matter**, which is assaulted by the tax, within the constitutional prohibition, and we are really relieved **from the necessity of examining the source** in order to determine the nature, character and effect of the tax. The very income itself, **without any reference to its source**, is its own courier, carrying its own message of prohibition against any taxation by the State of Oklahoma. If the salary of the Superintendent of the Osage Agency cannot be taxed as income by the State of Oklahoma, neither can the compensation or emoluments of his co-employee, the lessee, be taxed. We have, therefore, in the progress of this case drawn the authorities down to the point, where there is, and can be, no question as to the unconstitutionality of the Statutes of Oklahoma, as applied to the income taxes involved.

The Supreme Court of Oklahoma has been constrained to, and has always recognized the underlying law to be applied, but has simply **refused** to give application to the underlying principles. It has always stated them well, and then proceeded to pass

around them by some deduction not justified either in law or fact.

In **Large Oil Company v. Howard**, 63 Okla. 143, 163 Pac. Rep. 537, the Supreme Court of Oklahoma recognized the underlying principles, which decide the case at bar, in favor of the tax-payer. The case involved what is commonly called the "Gross Production Tax," which was to be in lieu of all other taxes. While pointedly recognizing the principles decisive of the case at bar in favor of the taxpayer, the Court was of opinion, however, that **"though possessing some of the characteristics of an occupation tax, the act in fact imposes a 'property tax.'**" The tax was attacked on two grounds: First, as an attempt to levy a privilege or occupation tax, and therefore invalid as to oil and gas produced through **the operations of a Federal agency**; and second, that oil and gas obtained or secured from lands in the Osage Nation is exempt from the operations of the tax. The Court clearly stated the principles exempting the subject-matter from the tax, but was of opinion they did not apply, and upheld the tax. Upon appeal to this court, however, in **Large Oil Co. v. Howard**, 248 U. S. 549, this Court reversed the Supreme Court of Oklahoma in a memorandum opinion, applying the principles which that Court recognized and stated, but was of opinion should not be followed.

The Supreme Court of Oklahoma said:

This case involves the **important** question of the **power of the State** to impose and collect the special tax provided for in Chapter 39, Session Laws 1916, where the owner of the property sought to be taxed is engaged under the authority of the Secretary of the Interior in the production of oil and gas in what formerly constituted the tribal lands of the Osage Nation of Indians in Oklahoma Territory, now Osage County, Oklahoma. The question arises upon the sufficiency of the petition of plaintiff in error to which the trial court sustained a demurrer.

Two grounds for reversal of the judgment are urged: (1) That the act in question is an attempt to levy a privilege or occupation tax, and hence invalid as to oil and gas **produced through the operations of a Federal agency**; (2) that the oil and gas obtained or secured from lands within the Osage Nation **is exempt from the operations of the tax** imposed by said act of the legislature. The two questions may be properly considered together.

It must be received as a postulate that the means or agencies provided or selected by the Federal Government, as necessary or convenient to the exercise of its functions, **cannot be subjected to the taxing power of the State**. This rule was announced in the leading case of **McCullough v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, where the State of Maryland had imposed a tax upon the issue of notes by a branch bank of the United States, doing business in that state. The Bank of the United States was incorporated by the Congress for the purpose of aiding in the fiscal operations of the Government, and for the issuance of bank notes, to be

used as currency. In declaring the tax unconstitutional, Chief Justice Marshall laid down the following principles, long since uncontroverted, and recognized as established law: That the taxing power of a state extends to every person and thing in its jurisdiction; that it does not extend to things not within state jurisdiction; **that the Government of the United States is supreme within its sphere**; that in carrying out its enumerated powers, the Federal Government has power to employ and create such agencies as it sees fit; **that these agencies are not within the state jurisdiction** (although operating in the state territory); and that to allow the state any power to impede or burden by taxation the agencies of the Federal Government by taxing the agencies of the Federal Government would be to allow them to nullify the powers granted to the Federal Government, since the power to tax involves the power to tax to the point of destruction, and by taxing the agencies of the Federal power to that point the states would be able to defy and render nugatory the power itself. * * *

It is not open to question that the plaintiff in error and a large number of oil producers in this state, alike situated, are to be deemed and considered in discharge of the functions imposed upon them by the general Government as a Federal agent or instrumentality, through which the Government discharges its duty to a considerable class of Indians, including the Osage Indians. *Choctaw, O. G. R. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779.

If the Supreme Court of Oklahoma had applied the principles, as above enunciated, the tax would have been declared invalid, a result which was later reached in and by the Supreme Court of the United States. That Court, therefore, the final authority to pass upon the question, held that these principles were the correct ones to apply, irrespective of what name might be given the tax by the legislature, or what character or nature might be given it by the highest Court in the State.

There can, therefore, under the authority of this decision by this Court, be no question but that the defendant in error in this case is **"in discharge of functions imposed upon 'him' by the general Government as a Federal agent or instrumentality through which the Government discharges its duties a considerable class of Indians, including the Osage Indians,"** and likewise including those of the Creek Nation under similar restrictions. In connection with the decision of the Supreme Court of the United States, reversing the conclusion of ~~this court~~, ^{the Supreme Court of the United States} it likewise clearly establishes that a tax on income derived from such leases by the State is an invasion of that sphere, the boundary line of which cannot be crossed by the State in exercising its taxing powers.

In the case of **In re Gross Production Tax of Wolverine Oil Company**, 53 Okla. 24, 154 Pac. Rep. 362, the Supreme Court of Oklahoma, again recognized the doctrines decisive of the correctness of the

conclusions reached by the trial court. This is another case involving the Gross Production Tax.

The Court, basing its recognition of the importance of the case upon the fact that like leases as in the case at bar were involved, at the very beginning, on page 27, said:

The importance of the legal questions presented by the present controversy is readily apparent, when it is known that there is involved many provisions of the state constitution, both conferring power and containing limitations upon the legislature in the exercise of the taxing power of the state; also the right of the state constitutionally to impose taxes of certain kinds due to the fact that a considerable portion of the oil and gas production of the state is carried on through the instrumentality of a Federal agency.

With reference to the status of oil and gas mining leases on lands of the Osage Nation and the Five Civilized Tribes, all of which are included in the present case, on page 37, the Court said:

In the leasing of the lands of the Osage Nation for oil and gas, as well as making such leases on the restricted lands of certain of the allottees of the Five Civilized Tribes, the Department of the Interior, acting pursuant to lawful warrant, has in behalf of these Indians, whom Congress has regarded as dependent, and in need of the Government's protection, **assumed full and complete jurisdiction and control during the period of dependency.** This form of general guardianship is exercised because of the duty owing these dependent peo-

ple, that the vast oil and gas deposits underneath their lands **may be developed and marketed**, and those lawfully entitled thereto given the benefit thereof. As was said in the Harrison case, **the instrumentalities made use of by the general Government are the lessees of such lands or their duly authorized assignees**. More need not be said in this connection, for the question is foreclosed in the Harrison case. The limitation upon the State's power in this respect is expressly recognized by the act itself, and by counsel, who say that the State cannot levy an occupation tax or a privilege tax **upon a Federal instrumentality acting under congressional authority**.

The Court further said, beginning on page 34:

The taxing power of the state is one of the highest attributes of sovereignty, and its authority to tax all subjects over which its sovereign power extends is undeniable; **but it cannot tax the instruments of the Federal Government, nor the means employed by the Congress to carry into effect the powers conferred by the Federal Constitution.** * * * As was held by the Supreme Court in **McCullough v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579:

"The Government of the Union, though limited in its powers, **is supreme within its sphere of action**; and its laws, made in pursuance of the constitution, form the supreme law of the land."

Again, in this connection, it was said by Chief Justice Marshall, in **Weston v. Charleston**, 2 Pet. 479, 7 L. Ed. 481, after referring to the Court's former opinion in **McCulloch v. Maryland**:

"All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. 'The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission,' but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.' "

The principles recognized in the preceding cases by the Supreme Court of Oklahoma, as being the unquestioned law, are the ones applied by this Court, when any of such cases reached it by appeal from this, the State Court, and they are the principles which are applicable to and decisive of the case at bar.

Even in the case of **In re Skelton's Lead & Zinc Company's Gross Production Tax** (Okla.), 197 Pac. Rep. 495, the case which the learned Chief Justice of the Supreme Court of Oklahoma claims is controlling in the case at bar, the Chief Justice recognizes the underlying principles, say on page 498:

That the operation of this class of leases is a **Federal instrumentality** we readily concede. That question was decided in **Choctaw O. & G. Ry. Co. v. Harrison**, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234, and **Ind. Ter. Oil Co. v. Oklahoma**, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779. Likewise, the proposition that the State has no power to levy a tax upon the privilege of operating a Federal instrumentality is con-

ceded. That question also was settled more than 50 years ago in **Thomson v. Union Pac. R. Co.**, 76 U. S. (9 Wall.) 592, 19 L. Ed. 792.

The Supreme Court of Oklahoma, therefore, has never **failed** to recognize the law as so often declared by this Court, and never **refused** to deny the application of the law as so declared, save and except in the opinion by Justice Kane, the first decision rendered by the Supreme Court of Oklahoma, which so clearly and cogently recognized the law as always declared by this Court, and unhesitatingly applied it.

When we consider the protection and care that Congress has always given to the Indians, and the attitude of the Government to them from the earliest times, we can well understand the results shown in these cases, which we have heretofore cited, could have been none other than reached.

This is well illustrated in **Tiger v. Western Investment Co.**, 221 U. S. 286, where this Court, citing other leading cases, beginning on page 310, said:

Assuming that the defendants in error are in a position to assert such constitutional rights, is there anything in the fact that citizenship has been conferred upon the Indians, or in the changed legislation by Congress upon the subject, which marks the deprivation of such rights? We must remember in considering this subject that the Congress of the United States has undertaken from the earliest history of the Government to deal with the Indians as a de-

pendent people and to legislate concerning their property with a view to their protection as such. **Cherokee Nation v. Georgia**, 5 Peter 1, 17; **Elk v. Wilkins**, 112 U. S. 94, 99, **Stephens v. Choctaw Nation**, 174 U. S. 445, 484. We quote two of the many recognitions of this power in this court:

"The power of the General Government over these remnants of a race once powerful, **now weak and diminished in numbers**, is necessary to **their protection**, as well as to the safety of those among whom they dwell. It must exist **in the Government** because it never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes" (**United States v. Kagama**, 118 U. S. 375, 384).

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." **Lone Wolf v. Hitchcock**, 187 U. S. 553, 565.

From every angle, therefore, which we approach the question, the tax must fall as against income derived from these leases on restricted Indian lands. Whether the tax be considered as, or in the nature of, a tax on property, an occupation of privilege tax, or as a tax separate and apart from all these taxes, it is a tax of such a nature, as applied to income derived from these leases, as enters the forbidden sphere occupied exclusively by the United States

Government, and, under the authorities cited, cannot be imposed upon and stand against such income. Its effect is necessarily such that it falls within the constitutional prohibition.

It is the **nature and effect**, and not its **form and name**, that determines whether or not it violates, and is in contravention or, the Constitution of the United States. The authorities, which we have adduced, clearly establish that the State cannot **directly or indirectly, closely or remotely**, impose a tax upon the agents, instrumentalities, persons, or property, which are used in the discharge of the governmental functions, duties and powers of the United States, no matter what form the tax assumes, and no matter by what name it may be called. These authorities equally and as clearly establish that the defendant, as the lessee in the leases involved, is an agent, instrumentality or means employed by the Congress of the United States to carry into effect the powers conferred by the Federal constitution upon Congress, and **neither he, nor his lease, as such, can be affected by any taxation imposed by the State of Oklahoma, either directly or indirectly.**

The tax is condemned under any line of authorities which we have cited. It is condemned under the authority of the Gross Production Taxes, because they clearly demonstrate that it partakes, and is, of the nature of a license or occupation tax, di-

rectly affecting the business of the Federal agent. It must fall under the authority of the Indian Territory Illuminating Co. case, and the Income Tax Cases cited, because they clearly establish that the tax is, in effect, one upon the leases themselves, and **a tax upon the lease is a tax upon the power to make the lease itself.** It cannot stand, because it is in effect, under all the authorities cited, **a tax upon an agent, instrumentality and means employed by Congress to carry into effect the powers conferred upon it by the constitution of the United States.** It cannot be sustained, because under all the authorities cited it is an invasion by the State in **that absolute and exclusive sphere in which the United States alone can be and act, and into which the State cannot enter with taxation or other exercise of governmental powers.** It must be held unconstitutional as to the income from such leases, because under the authorities cited, and the State is hedged with absolute limitations upon its taxing powers beyond the line of which it cannot pass, and that absolute limitation is met, **"when taxation by a state acts upon the instruments, emoluments and persons, which the United States may employ as necessary and proper to execute their sovereign powers"** (*Dobbins v. Erie Co.*, *supra.*)

From the rules, doctrine and principles deduced from the foregoing authorities, we submit that the State of Oklahoma has no power, right or authority to tax the income from the leases on restricted Indian lands, involved in the case at bar, and the judgment of the Supreme Court of Oklahoma must be reversed.

V.

The cases, cited and relied on by the State in the Supreme Court of Oklahoma, do not govern the case at bar, and are clearly distinguishable from this Case, and the Cases cited as controlling its decision.

We shall not now undertake to specifically consider all the cases cited by the State before the Supreme Court of Oklahoma, but shall not merely note some of the more important ones, and show they are clearly distinguishable, and not applicable to the case at bar, preferring to await the Brief of the State before undertaking to consider them all. We believe, however, that principles, which we shall now note, will apply to any cases the State may be able to cite.

The Attorney General strenuously contended in the Supreme Court of Oklahoma, and all through the progress of this Case, that income tax taxes a thing separate and apart from the property or source derived from and that the source, therefore, cannot be considered in determining whether or not the tax falls within the constitutional prohibition invoked.

The position and contention of the Attorney General are well stated by Mr. Justice Kane, in his opinion holding the taxes invalid, the Justice saying:

Conceding the non-taxibility of the source of the income sought to be taxed, viz., the oil and gas leases, the Attorney General argues that, keeping in mind the proper conception of

income taxation, it cannot be said that because the income derived from the sale of oil and gas, which oil and gas was derived from the restricted Indian lands, such income is exempt from taxation on the ground that it constituted an unlawful burden upon a Federal agency or instrumentality. The income sought to be taxed says the Attorney General, "is net income determined after the close of the preceding year's business after it has been determined that, less all expenses and necessary expenditures of every nature, there still remains in the hands of the tax payer a net income. This net income, so remaining is the thing that is taxed and its taxation cannot possibly amount to a burden. upon the exercise of a Federal Agency."

Counsel forget that, in the Pollock Case, meeting just such contentions, referring to the tax held invalid in **Weston v. Charleston**, this Court said:

That was a **State tax**, it is true; but the States have power to lay income taxes, and if **the source is not open to inquiry, the constitutional safeguards might be easily eluded.**

We have clearly established, by the authorities heretofore cited, that the cases cited and relied on by the State in the Court below, are not applicable to, and do not govern, the case at bar. It is, therefore, perhaps unnecessary to directly call the Court's attention to any distinguishment of the cases so cited and relied upon by the State, but, out of the abundance of caution, and with the desire to aid the Court all we can in arriving at its de-

cision in the case, we desire to now briefly discuss this proposition.

After having considered the cases, we have heretofore cited, the Court will readily see that the Federal Government occupies an entirely different position in, and relationship to, the leases now involved from that which it has with reference to interstate Commerce. The Federal Government **never participates in Interstate Commerce, and never employs agents, instrumentalities and means in the prosecution of such commerce**, but it is its **governmental duty and function** to either exploit and develop these lands of its Indian wards, or **to employ some one else as its agent, instrumentality and means to do the same in its place and stead**. If however, the Federal Government did engage in Interstate Commerce, and it was its duty to so engage in such commerce, and it has employed some persons to so engage in such commerce for it, and to be its agent, instrumentality and means in so discharging its duty and obligations, as it was its duty and obligation, and it has, in the present case, and in the leases involved, then the case would fall within the principles of the cases which we have cited, and not those which have been cited and relied upon by the learned Attorney General and his able Assistant.

We need go no further than to again cite this court the case of **Large Oil Company v. Howard, supra**, to establish the status of the defendant in er-

ror, as the lessee in the lease involved. The Supreme Court of Oklahoma, in that case, said:

It is not open to question that the plaintiff in error and a large number of oil producers in this State, alike situated, are to be deemed and considered in discharge of the function imposed upon them by the general Government as a Federal agent or instrumentality, through which the government discharges its duty to a considerable class of Indians, including the Osage Indians, *Choctaw O. G. R. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779.

This is but following the doctrine of the Federal courts, as stated by this Court, in the case of *Railroad Co. v. Harrison*, *supra*, where the Court said:

From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is to be carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a State.

Now, as we have heretofore shown, the State cannot impose any taxation on such an agent, instrumentality or means, either directly or indirectly. It does not matter whether the tax be small or great, burdensome or not, the State is absolutely prohibited

from action at all. In other words, such a tax is an invasion of that absolute sphere **which the United States alone can, and does, occupy,** and the courts will not stop to consider whether the tax is burdensome, but the only question is whether or not it **affects the subject-matter at all.** Stating the proposition another way, **there is an absolute lack and want of power and authority in the State to tax, directly or indirectly, closely or remotely, the subject-matter involved in the case at bar.**

As said in **M'Culloch v. Maryland, supra,** referring to the Supremacy of the United States in such matters as now involved, this Court said:

It is of the very essence of supremacy to **remove all obstacles to its action within its own sphere, and to so modify every power vested in subordinate governments as to remove all obstacles to its action within its own operation from their influence.**

The Court further said:

The sovereignty of the State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States? We think it demonstrable that it does not. * * * The attempt to use it on the means employed by the Government of the Union, in pursuance of the Constitution is itself an abuse. * * *

We find, then, on just theory, a total failure of this original right to tax the means employed by the Government for the execution of its powers.

In *Weston v. Charleston*, *supra*, the Court said:

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the legislature from **direct opposition** to those made by the United States. **The restraint is imposed by our Constitution.** The American people have conferred the power of borrowing money on their Government, and by making that Government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with the restraining or controlling power, and **the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.**

The right to tax the contract to any extent, when made, must operate upon the power to bar it before it is exercised and have a sensible influence on the contract. **The extent of the influence depends on the will of the distinct government.** To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

It was said in the *Harrison* case, *supra*, (and the same characterization can and must be given to the income tax now), **"In effect, the Oklahoma act prescribes an occupation tax; * * * and we think it (lessee) cannot be lawfully subjected thereto."**

As was said in the Indian Territory Illuminating Company Case, *supra*, where the leases were used indirectly to determine the value of stock sought to be taxed:

A tax upon the lease is a tax upon the power to make them, and could be used to destroy them. If they cannot be taxed as entities, they cannot be taxed vicariously by taxing the stock as an evidence rather than by directly estimating them as the Board of Equalization and the referee did.

The Court also said in the Pollock case, *supra*:

The name of the tax is unimportant. * *

*** An annual tax upon the annual value or annual user of real estate appears the same in substance as an annual tax on real estate, which would be paid out of the rent or income. * * ***

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot thus be evaded. It is the substance and not the form which controls and has indeed been established by repeated decisions of this court. Thus in *Brown v. Maryland*, * * * it was held that a tax on the occupation of an importer was the same as a tax on imports, and therefore void. And Chief Justice Marshall said: It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must

perceive that a tax on the **sale** of an article, imported only for sale, is a tax on the **article** itself." * * * "**The substance, and not the shadow, determines the validity of the exercise of the power.**"

The court further said:

It follows that if the **revenue** derived from municipal bonds cannot be taxed **because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.**

The Pollock Case contains a rich collection and treatment of the various cases, all of which are applicable to the case at bar, and is a brief in itself, clearly sustaining our contentions.

Nor does the question whether or not the tax as now enforced really constitutes any **sensible or appreciable effect** on the operations of the agency or instrumentality help to relieve the invalidity of the law? The prohibition against the exercise of the power by the State is **absolute**, and it is the potentiality of the power exercised to destroy, and not whether it has reached the point of being a burdensome interference, that impregably places the prohibition against its exercise.

In **Savings Bank v. Minnesota**, *supra*, quoting from the old and leading case of **Weston v. Charleston**, 2 Pet. 449, this court said:

The American people have conferred the power of borrowing money on their Government, and by making that Government supreme, have shielded its action, in the exercise of this power, **from the action of the local government.** The grant of power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration **that no such restraining or controlling power** shall be exercised. **The right to tax the contract to any extent,** when made, must operate upon the power to borrow before it is exercised, and have a **sensible influence** on the contract. The extent of this influence depends on the will of a distinct government. **To any extent, however, inconsiderable, it is a burden on the operations of the government.** It may be carried to an extent which shall arrest them entirely.

We might well paraphrase the language of the Court, if this case had been before it, and applying the underlying principles, the court would have been required to say, and doubtless would have said, the following:

The American people have conferred the power of dealing with the Indians and their property, and acting for them as its wards, and making the leases and supervising their operation, on their Government, and by making that Government supreme, have shielded its action in the exercise of this power, **from the action of the local government.** The grant of this power is incompatible with a restraining or controlling power, and the declaration of supremacy is a declaration **that no such restraining or controlling power** shall be exercised.

The right to tax these leases, directly or indirectly, to any extent, when made must operate upon the power to make such contracts and provide income for the Indians, and have a sensible influence upon the contracts. The extent of this influence depends on the will of a distinct government. **To any extent, however inconsiderable, it is a burden on the operations of the Government.** It may be carried to an extent which shall arrest them entirely.

One of the principal cases relied upon by the plaintiff in error is that of **United States Glue Co. v. Oak Creek**, 247 U. S. 321, 62 L. Ed. 1135, which is typical of the others. As we have indicated, however, the Federal Government itself was not a party to any Interstate Commerce involved, as in the operation of these leases. The Federal Government itself never engages in Interstate Commerce, and there is no duty imposed upon it to do so, if, however, it had the constitutional duty imposed upon it to so engage in such Commerce, as it is its duty to exploit and develop these Indian lands, and, instead of doing so, it had employed the Glue Company to do so, as it has employed the defendant in error in the case at bar, then a different question would have been presented, and, under the authorities, which we have cited, the court would undoubtedly have held that the state was without any power whatever to affect by taxation, directly or indirectly, closely or remotely, the income derived from such Commerce, and payable to its agent, instrumentality or means

used to so discharge its Governmental functions and duties. But the Federal Government is under no duty or obligation to engage in such commerce, and does not do so, and that case is not applicable whatever.

It is interesting to note the argument employed by counsel representing the defendant in error, the authority imposing the tax. Counsel very strongly urged upon the Court that the tax was not and could not be considered in any view one upon an **instrumentality** of the Federal Government, or upon the **emoluments** of one employed by the Federal Government. Counsel for the defendant in error recognized the very distinction, which we have made in this, and it is probably unnecessary to cite other cases to the Court.

For instance, the following appears in the report of Counsel's Brief:

The tax here is not in any view one upon an instrumentality of the Federal Government, and **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L. Ed. 579, has no application.

Also counsel contended in the brief as follows:

It is not a tax upon the salary of an officer of the Federal Government, and therefore, the principle of **Dobbins v. Erie County**, 16 Pet. 435, 10 L. Ed. 1022, and of **Collector v. Day** (**Buffington v. Day**), 11 Wall. 113, 20 L. Ed. 122, is not involved.

Counsel also contended:

It is not a tax upon an agency of commerce, or upon the receipts of an interstate carrier; and, therefore, the cases of that class are not in point.

But we have clearly shown, in the cases heretofore cited, this brief, that the defendant, as a lessee, is directly the **agent, instrumentality and means of the Federal Government** in discharging its governmental functions and duties to its Indian wards; that the compensation allowed is in the same class as that of any other employe of the Government, and that to tax it, either directly or indirectly, would be a tax really on the income of the Federal Government itself. It further readily appears that the effect of the tax is to bear upon and influence, not only the **powers** of the Federal Government to discharge its governmental functions, but also upon **its contract** to have others do the same.

We again call the Court's attention to the fact that, in the case of **Pollock v. Loan & Trust Co.**, *supra*, a stress was laid upon every argument now made by the learned Attorney General and his learned assistant to avoid the inhibition against the State to lay this tax; seeking thus to justify the act on the part of Congress. We have also shown that the Sixteenth Amendment has not at all enlarged the powers of the State, and it is in the same position Congress was before that amendment; that is,

where it cannot tax the source, it cannot tax the income derived therefrom.

With reference to these arguments, the Court said:

The **stress** of the argument is thrown, however, on the assertion that an income tax **is not a property tax at all**; that it is **not a real estate tax**; that it is an assessment upon the taxpayer on account of his money spending power as shown by his revenue for the year preceding the assessment; that **rents received, crops harvested, interest collected, have all lost their connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject matter, in other words that income is taxable irrespective of the source from whence it is derived.**

After stating the same views were entertained with regard to the English Income Tax Act, the Court rejected these arguments, and held emphatically that the **source** must be considered in determining the character of the tax as to the constitutional limitations and provisions governing the United States and the States, saying:

The dissenting Justice proceeded in effect upon this ground in **Weston v. Charleston**, 27 U. S. 2 Pet. 449 (7:481), but the court rejected it. That was a **State tax**, it is true; but the States have power to lay income taxes, and if the **source** is not open to inquiry, constitutional safeguards might be easily eluded.

The Court later also said:

If the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source.

The Attorney General also cited, and the Supreme Court of Oklahoma relied on, the case of *Shaffer v. Carter*, 252 U. S. 37, which merely holds that income, which may come from interstate commerce is not necessarily exempt from income tax levied by the Statutes of Oklahoma, and that the fact that the tax-payer was a non-resident of the State of Oklahoma did not relieve him from paying income taxes derived from business conducted and property existing in the State of Oklahoma. There was no question in that case as to an income tax imposed income upon leases of the character involved in this case, and no question of an attempt by the State of Oklahoma to impose an income tax on income or emoluments coming to a Federal agent, as directly employed by the Government of the United States, as in the case at bar.

The Attorney General also cited several cases, noted by the Supreme Court of Oklahoma, generally sustaining the constitutionality of a statute of a State imposing income taxes. With these cases, we have no quarrel. We have never denied the right of the State of Oklahoma to pass an income tax, and recognize that it has the right to impose such a tax on the larger part of income of its citizens, but none of these cases involved income of the character now under consideration, and none

of these cases recognize any right in a State to impose such a tax upon the income of a Federal agency or instrumentality, received directly and solely as compensation for its services as such.

We are not contesting the general validity of the act, but we are denying its validity as applied to the income derived from the leases on restricted Indian lands, and upon income which is clearly the compensation or emoluments of a Federal agent or instrumentality.

We can cheerfully admit that a State may tax *ad valorem* the physical property of a person or corporation engaged in interstate commerce, or even conducting a Federal agency, or acting as an instrumentality of the Federal government, so long as the tax does not reach property itself which is a part of the Federal agency or instrumentality. We can also admit that, in addition to an *ad valorem* tax, the State may enforce an occupation or privilege tax upon the privilege of doing business under its control, but it cannot do so upon one *under Federal control such as a Federal agency or instrumentality*. We may further admit that a State may lawfully make income, gross receipts, or the like, the fair measure of the value of property, and may levy a tax thereon, where the property taken as the measure is within the taxing powers of the State, but where the property itself, which is measured by the receipts or income, net or gross, cannot be taxed by reason of its Federal nature or character, a tax which seeks to reach, or results in reaching, such property, either directly or vicariously, through such receipts or income, is necessarily void.

The case at bar, therefore, involves a subject-matter which is absolutely beyond the power of the State to tax, since the income from the lease is, in effect, the compensation or emoluments received by a Federal agent from operating a Federal instrumentality, as much so as when the Telegraph Companies were receiving compensation for the messages sent or government business, and paid for by the Government, or when an employe receives his salary in the discharge of his duties to the Government, inasmuch as the lessee in these leases is equally discharging his duties to the Government, while engaged in its employment.

Briefly reverting to *United States v. Railroad Co.*, 17 Wall. 322, after stating the exemption of the agencies and instrumentalities of the State from the taxing power of the Federal Government, and stating the reciprocal positions of that Government and the States, the Court said:

Their operations may be impeded and destroyed, if any interference is permitted. Hence, *the beginning of such taxation is not allowed on the one side and is not claimed on the other.*

Also, again referring to *Western Telegraph Co. v. Texas*, 105 U. S. 460, where there was levied "a specific tax on each message * * * sent by public officers on the business of the United States," the Court said:

As to the Government messages, *it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and, therefore, void.*

Again briefly noting the case of *Williams v. Talladega*, 226 U. S. 404, were it not for the saving clause of Paragraph (f), of Section 5, of the Oklahoma Statutes, exempting from taxation such income, "as is exempt from taxation by some law of the United States," or of the State of Oklahoma, this Court might be urged, and constrained, to hold the entire Act of Oklahoma void.

Quoting from the case last cited, the Court said:

"As to the government messages it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and, therefore void." * * *

The Ordinance sustained in *Postal Teleg. Cable Co. v. Charleston*, 155 U. S. 692, expressly excluded interstate and government messages.

Were it otherwise, an agency of the Federal Government, in the execution of its sovereign powers, *would be at the mercy of the taxing power of the State.* * * *

We have, then, an ordinance which taxes, without exception, the privilege of carrying on a business a part of which is that of a governmental agency constituted under a law of the United States and engaged in an essential part of the public business, communication between the officers and departments of the Federal Government. The ordinance, *making no exception* of this class of business, necessarily includes its transaction within the privilege tax levied. This part of the license necessarily *affects the whole*, and makes the tax unconstitutional and void.

In this connection, it must never be forgotten that, in the Pollock Case, this court adhered in both of its

opinions to its refusal to permit the interest on municipal bonds, instrumentalities of the States, to be taxed as income because of the absolute lack of power to tax the source, and on the broad principle that neither the United States nor a State could thus tax *indirectly* what the one or the other could not *directly* tax. It was held that this could not be done, not merely on account of the violation of the constitutional requirement of apportionment, but upon the absolute lack of *any power* to tax.

As was said by the Court :

The Constitution contemplates the independent exercise by the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the *powers*, the *operations*, or the *property* of the United States, nor the *means* which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities of the property of a State.

The Court also said :

It is contended that although the property or revenues of the states or their instrumentalities cannot be taxed, nevertheless the income derived from state, county and municipal securities can be taxed. But we think the same *want of power* to tax or revenues from the states on their instrumentalities exists *in relation to their securities*.

Again, the late Chief Justice White, in his opinion, on page 652, said :

In regard to the right to include in an income tax the interest upon the bonds of municipal cor-

porations, I think the decisions of this Court holding that the Federal Government is *without power* to tax the agencies of the State Government, embrace such bonds, and that the settled line of authority is conclusive on my judgment here. It determines the question that where there is *no power* to tax for any purpose whatever, *no* direct or indirect *tax* can be imposed.

And also Mr. Justice Harlan, on page 653, said:

Any tax imposed directly upon interest derived from bonds issued by a municipal corporation for municipal purposes under the authority of the State whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the State creating it can impose. In such a case it is *immaterial* to inquire whether the tax is in its nature or by its operation a direct or indirect tax, *for the instrumentalities of the State * * ** *are not subjects of national taxation in any form or for any purpose.*

In the cases cited and relied on by the State, the Government of the United States is not a party to the interstate commerce, but private parties merely are operating under the constitutional provisions. This Court has always held that, where a tax but remotely or indirectly affects the party so engaged in such commerce, and thus burdens the same, it may be sustained, but if it directly affects and burdens the same, then it is unconstitutional. But, in the case at bar, the lessee takes the place of the Federal Government itself, and is *employed by it to discharge its governmental functions, duties and obligations*, and it is the same as if the State were attempting to tax that Government's revenues, or the sal-

ary, compensation or emoluments, it was paying to its own officers, agents or employees. The lessee is as much an employe of the United States Government as the Secretary of the Interior, the Superintendent of the Union Agency, having charge of the lease of Jackson Barnett, and his lands, and the Superintendent of the Osage Agency, having charge of the leases of the Osage Indians. It will be conceded by all that the State of Oklahoma cannot tax the salaries or incomes of these officials of the Government of the United States.

It is not a question, therefore, as to what the Legislature of the State of Oklahoma, its Supreme Court, or its Constitution, shall call this tax, or the nature it would have, if dealing merely with a governmental power that was plenary over it. It might, by all these authorities, be held not to be strictly an occupation tax, or privilege tax, or a license tax, or a property tax, or it might be held to be either the one or the other, or to partake of the nature of the one, or others, or all, or of the character contended for by the State, so far as made to apply to income, which the State may have the undoubted right to tax; but, *when its application is extended to subject-matter within the powers of Congress, or affects such sub-matter, then the very character of the tax may be changed*; for it is the *effect* of the tax, and not its *form* or *name* that *determines* whether or not it infringes the Constitution of the United States. A tax cannot be imposed by the State, *directly or indirectly, closely or remotely*, upon or affecting an agent, instrumentality, per-

son or property, which is used in the discharge of the governmental powers, duties and obligations of the United States, and it makes no difference what *form* the tax assumes, or by what *name* it may be called. There is no shadow line, and, if by any possibility or potentiality, it may affect the person or the property used as such agent, instrumentality or means, then the tax must fail; for the State is absolutely without any power to impose any tax of such a character whatsoever.

VI.

The learned Chief Justice of the Oklahoma Supreme Court based his holding as to the validity of the taxes involved on the case of *In Re Protest of Skelton Lead & Zinc Co.*, 197 Pac. Rep. 495, apparently on the theory that, as this Court handed down merely a memorandum opinion in each of the cases of *Large Oil Co. v. Howard*, *supra*, and *Howard v. Gypsy Oil Co.*, *supra*, it would be presumed that the Gross Production Tax of 1916, involved in those cases, were some other or different statutes than of that year, and that this Court has never passed upon that Statute.

The learned Chief Justice appears as an attorney for the State in both the cases of *Indian Territory Illuminating Co. v. Oklahoma*, 240 U. S. 522, and *Large Oil Co. v. Howard*, 248 U. S. 549, and, in the latter case filed an elaborate brief and argued the case before this Court. The Transcript of the Record, and the brief of counsel, including that of the learned Chief Justice for the State of Oklahoma, clearly show that identically the same Act of the Legislature was involved, in each of the cases, in which this Court handed down merely a memorandum opinion, as the Chief Justice now presumes was not before this Court, and which this Court held unconstitutional as applied to the gross productions or gross receipts derived from leases of identically of the same kind as those involved in this Case. It would stretch credulity too long and too far to reach the conclusion that the learned Chief Justice did not then know that the same statutes were before this court as he had before

him, when he indulged the presumption, and again led the Supreme Court of Oklahoma to solemnly declare the application of the identical statute constitutional, after this Court in five cases, at least, had held the same invalid. And it would take the wildest flight of imagination to lead us to believe that this Court did not fully understand what statutes of Oklahoma it had before in deciding the cases, although handing down merely memorandum opinions, predicated upon cases already decided. Our own personal belief is that, if the fact does not speak plainly for itself, and presumption is to be indulged, it is that it should be presumed this Court felt so completely satisfied with its former decisions, and that the attempt of the Legislature of Oklahoma to circumvent them by new legislation was so futile, that it was considered unnecessary to hand down a formal and written opinion. Mr. Justice Kane, in his opinion, recognizes that the same Act of 1916 was involved in the cases mentioned, and followed them, denying validity to the attempt of the State to tax the income involved.

The learned Chief Justice inferentially admits that if this same Act of 1916 was involved in the cases decided by this Court, then the Gross Production Tax on similar leases as those now involved must fall as unconstitutional, and the tax on the income therefrom likewise be held invalid. We submit that the presumption indulged in by the Chief Justice will not suffice to sweep away all these cases decided by this Court, and that, under the authority of those cases, the decision of the Supreme Court of Oklahoma must be reversed.

Conclusion.

We have endeavored to present, in convenient form, some of the early and late decisions by this Court, not with any idea that so many and much may be necessary, but that they may thus serve the convenience of the Court, if it should desire to review them. We abide in the absolute confidence that the cases, which we have presented, involving identically the same kind of leases, are complete authority for the reversal of the last decision of the Supreme Court of Oklahoma in this case.

We appreciate the reluctance this Court will always have in denying to a State a power of taxation, but also know that it will not hesitate to do so where it is necessary to preserve the very sovereignty of the National Government. We firmly believe, and we unhesitatingly urge, that this Court is now presented with another case, in which it must exercise its authority in preserving the sovereignty of the United States, as it has so often held inviolate the sovereignty of the States, when encroached upon by Congress.

We respectfully submit that the decision and judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

JAMES PATRICK GILMORE,
Attorney for Defendant in Error, and Petitioner.

APPENDIX.

Statutory Provisions.

For the convenience of the Court, although perhaps not necessary, we will, in this connection, set forth fully the Statutes of Oklahoma which are applicable to the collection of taxes on incomes. As the Income Returns involve four years, and the Statutes have been amended, we are setting them forth so as to show the Court the Statutes as they have stood at all times involved in these proceedings.

Prior to 1915, the Income Tax Laws of the State of Oklahoma were comprehended in Article XVII, Chapter 72, Revised Laws of Oklahoma, 1910.

By the Act of the Legislature of Oklahoma, approved March 17, 1915, Chapter 164, Session Laws, 1915, beginning on Page 232, Article XVII, Chapter 72, Revised Laws of Oklahoma, 1910, was repealed and that Act enacted in lieu thereof, subsequently, by the Act of the Legislature of Oklahoma, approved March 2, 1917, Chapter 265, Session Laws 1917, beginning on Page 227, Sections 3, 7 and 12, of the Act of 1915, above referred to, were amended. Also, by Joint Resolution No. 12, by the Senate and House of Representatives, approved March 10, 1919, Chapter 309, Session Laws 1919, beginning on Page 461, the time for filing returns was extended until April 1, 1919, for that year. These now con-

stitute the law relative to the taxation of incomes by the State of Oklahoma.

Section 1 of the Act of 1915, with reference to the imposition of an income tax under the Laws of the State of Oklahoma, provides as follows:

Section 1. Each and every person of this State shall be liable to an annual tax upon the entire net income of such person arising from all sources during the preceding calendar year, and a like tax shall be levied, assessed, collected and paid annually upon the entire net income from all property owned, and of every business, trade or profession carried on in this State by persons residing elsewhere.

Section 2 of the same Act, with reference to the date of filing the Return and the period covered thereby, provides as follows:

Section 2. On or before the first day of March of each year, each person liable for an income tax under the provisions of this Act shall file with the State Auditor a sworn return of his net income for the year ending December 31st last preceding, upon blanks to be prescribed by said State Auditor and furnished to the taxpayers. Said statement shall be made as near as practical at the time of making the Federal income tax return.

Section 3 of the same Act, with reference to failure of persons liable to make return, or for making false or fraudulent return, provides as follows:

Section 3. Any person liable for an income tax under the provisions of this Act, who shall fail, refuse or neglect to make the return under oath as required by this Act, on or before the First day of

March for the last preceding calendar year, shall be liable to a penalty of one hundred dollars in addition to the said tax, to be collected as other taxes are collected. Any person required by law to make, render, sign or verify any return under this Act, and who makes any false or fraudulent return or statement with intent to defeat or evade the payment of the tax herein levied, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand Dollars, or by imprisonment in the county jail not to exceed six months, at the direction of the Court, with the cost of prosecution.

This same Section 3, as amended by Section 1 of the Act of March 2, 1917, provides as follows:

Section 1. That Section 3 of Chapter 164, of the Session Laws of Oklahoma, 1915, be and the same is hereby amended to read as follows:

Section 3. If any person liable under the terms of this Act fails to render such statement within the time required, or renders any return which is false or fraudulent in that it contains statements which differ from the real income of said person for the calendar year for which said report is made, the State Auditor may give such person ten days' notice in writing to appear before him in his office in the State Capitol with books of account containing entries relating to his business for such calendar year, and may require such person to give testimony or answer interrogatories under oath, which may be administered by the State Auditor, respecting any income liable to such tax or the return thereof. If such person fails to make such return or to permit an examination of his books or answer such questions relating to said income as may be proper and within the scope of such investigation of such income, the State Auditor may ap-

ply to the District Court of Oklahoma County, or any judge thereof for an order requiring such person to give such return or to permit such examination. Such court or Judge shall thereupon issue its order upon reasonable notice as shall be prescribed therein, to be served upon such person and directing him to appear and testify and to produce such books, papers and records as may be required. A party failing to comply with such order shall be guilty of contempt and shall be punishable as provided by law in cases of contempt. Provided further, that the District Court of Oklahoma County shall have jurisdiction of contempt cases arising under this Section. If upon such hearing before the State Auditor or any such court, it be found that such person has been guilty of violation of the provisions of this Act by refusing to make a report as provided for in this Act, there shall be added to the tax of such person for the calendar year for which such report is made a penalty of Five (\$5.00) dollars per day for each and every day that such person has refused to make such report after the date of March 1st of each calendar year, the same being the date provided in this Act for the filing of such report; provided, that on application the State Auditor may extend the time for making such report.

Section 4, of the Act of 1915, authorizing the State Auditor to prescribe and promulgate Rules and Regulations, provides as follows:

Section 4. The State Auditor is hereby empowered to prescribe and promulgate such rules and regulations as may be necessary to carry out the provisions of this Act, and shall prepare and furnish for the use of persons liable for the income tax hereunder all necessary blank affidavits and other forms for making the income tax returns.

Section 5 of the same Act, defining incomes, reads as follows:

Section 5. The term "income" as used in this Act, shall include:

(a) All rentals derived from real estate or any interests thereunder of a potential duration of two years or more.

(b) All interest derived from money loaned or invested in notes, mortgages, bonds or other evidences of debt of any kind whatsoever.

(c) All wages, salaries or fees derived from services; provided, that compensation of public officers for public service shall not be computed as a part of the taxable income in such cases where the taxation thereof would be repugnant to the Constitution.

(d) All dividends or profits derived from stocks or from the purchase and sale of any property, or other valuables acquired within one year previous, or from any business whatsoever.

(e) All royalties derived from the possession or use of franchise or legalized privileges of any kind.

(f) And all other income of any kind derived from any source whatsoever, except such as is exempt from taxation hereunder by some law of the United States or of this State.

Section 6 of the same Act, providing for the deductions to be allowed in the computation of the net income, reads as follows:

Section 6. In computing the net income taxable under the provisions of this Act, there shall be allowed as deductions from the income of any person:

First: The necessary expenses actually paid in carrying on any business, not including personal, living or family expenses;

Second: All interest paid within the year by a taxable person on indebtedness;

Third: All state, county, school and municipal taxes paid within the year, not including those assessed against local benefits;

Fourth: Losses actually sustained during the year incurred in trade, or arising from fires or storms, and not compensated for by insurance or otherwise;

Fifth: Debts due to the taxpayer actually ascertained to be worthless and charged off within the year;

Sixth: A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business not to exceed in the case of mines, five per centum of the gross value, at the mine of the output for the year for which the compensation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: Provided, that no deduction shall be allowed for any amount paid out for new buildings, permanent improvements or betterments, made to increase the value of any property or estate.

Section 7 of the same Act, with reference to the computation of the graduated tax to be imposed, provides as follows:

Section 7. There is hereby levied annually a tax for the current expenses of State government, upon all incomes taxable hereunder in excess of Three Thousand Dollars (\$3,000.00) to be computed upon the following rates:

(a) On the first ten thousand (\$10,000.00) dollars of such excess or any part thereof, at the rate of ten mills on the dollar.

(b) On the next fifteen thousand (\$15,000.-00) dollars of such excess or any part thereof, twenty mills on the dollar.

(c) On the next twenty-five thousand (\$25,000.00) dollars of such excess or any part thereof, thirty mills on the dollar.

(d) On the next fifty thousand (\$50,000.-00) dollars of such excess or any part thereof, forty mills on the dollar.

(e) And on all such excess in addition to the aforesaid amounts, fifty mills on the dollar.

The said tax shall be in all cases computing by adding together the amounts payable under each of said classes.

This same Section 7, as amended by the Act of 1917, provides as follows:

Section 2. That Section 7 of Chapter 164 of the Session Laws of Oklahoma, 1915, be and the same is hereby amended to read as follows:

Section 7. There is hereby levied annually a tax for the current expenses of State government, upon all incomes taxable hereunder, in excess of three thousand (\$3,000.00) dollars, to be paid upon the following rates:

(a) On the first ten thousand (\$10,000.00) dollars of such excess, or any part thereof, at the rate of seven and one-half mills on the dollar.

(b) On the next Fifteen Thousand (\$15,000.-00), dollars of such excess or any part thereof, fifteen mills on the dollar.

(c) And all such excess in addition to the aforesaid amounts, twenty mills on the dollar.

The said tax in all cases to be computed by adding together the amounts payable under each of said classes.

Section 8 of the Act of 1915, with reference to the exemption allowed as deductions, provides as follows:

Section 8. The Auditor shall be authorized to allow every person as net income not taxable, the following deductions:

(a) To an individual, nothing beyond the said sum of three thousand (\$3,000.00) dollars.

(b) But to an individual living with his or her spouse an additional One Thousand (\$1,000.00) Dollars.

(c) For each child under the age of eighteen years the sum of Three Hundred (\$300.00) Dollars additional.

(d) For each child and every person for whose support the taxpayer is legally liable and who is actually and solely supported by and totally dependent upon and or actually and permanently domiciled with the taxpayer, an additional \$500.00, while such dependent is engaged solely in acquiring an education, and two hundred (\$200.00) dollars in other cases. In computing said exemptions and the amount of taxes payable under this act, the income of the wife shall be added to the income of her husband, and the income of each child under eighteen years of age, to that of its parents or parent when said wife or child is not living separately from said parent or parents.

Section 9 of the same Act, with reference to the powers of the State Auditor to revise returns, provides as follows:

Section 9. The State Auditor is authorized to revise any returns that may be made to him, and he shall notify the party making such return of such revision on or before the first Monday in May following, and the Auditor shall hear and determine all complaints arising from such revision which are made before the first Monday in June following thereafter, and he shall have the same power to correct and adjust such assessment of income as is now given by law to the county board of equalization in cases of assessments of property *ad valorem* and the remedy and proceedings before the said Auditor shall be the same as those provided for reviewing assessments of property *ad valorem* by the county board of equalization.

Section 10 of the same Act, with reference to the completion of assessments, payment and delinquency of taxes, provides as follows:

Section 10. The State Auditor shall complete the assessment of income for each person and compute the tax thereon on or before the first Monday in June of each year, and such taxes shall be due and payable upon the fifteenth day of June, and shall become delinquent if not paid on or before the first day of July next following. Whenever any such tax becomes delinquent, the State Auditor shall have power, and it shall be his duty to issue to any sheriff of this State a warrant, such as is provided in Section 7392, Revised Laws of Oklahoma, 1910, except that it shall command him to pay the amount collected to the State Auditor. Such proceedings shall be had thereon as upon a tax warrant issued by a county treasurer for delinquent taxes.

Section 11 of the same Act, with reference to liens and penalties, provides as follows:

Section 11. If any of the taxes levied herein, become delinquent, they shall become a lien on all the property, personal and real, of such delinquent person, and shall be subject to the same penalties and provisions as are all *ad valorem* taxes.

Section 12 of the same Act, with reference to the publication of returns, provides as follows:

Section 12. It shall be unlawful for any person to print or publish in any manner whatever, any income tax return, or any part thereof, or the taxes due thereon unless the tax due herein becomes delinquent; and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not to exceed Fifty (\$50) Dollars and imprisonment in the county jail not more than thirty days for each offense.

This same Section 12, as amended by the Act of 1917, provides as follows:

Section 3. That Section 12 of Chapter 164 of the Session Laws of Oklahoma, 1915, be and the same is hereby amended to read as follows:

Section 12. It shall be the duty of the State Auditor to keep a record of all such reports made and income taxes paid under the provisions of this Act, which record shall be at all times open to the inspection of any official entitled to the same, either State or Federal.

SUBJECT INDEX.

	Page.
Statement -----	1
Nature of Oklahoma Income Tax -----	4
Argument Under Proposition No. 1 -----	5
Income Tax Not Within the Rule Announced in Gross Production Tax Cases -----	4
Proposition No. 2 -----	14
Gross Production Tax Property Tax Therefore Legal -----	4

ALPHABETICAL LIST OF AUTHORITIES

<i>Black on Income Taxes</i> , Section 187 -----	6
<i>Commonwealth v. Werth</i> , 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916 D, 1263 -----	7
<i>Choctaw, Oklahoma & Gulf R. Co. v. Harrison</i> , 235 U. S. 292, 59 L. Ed. 234 -----	5-15
<i>Choctaw, Oklahoma & Gulf Ry. Co. v. Mackey</i> , U. S. Adv. Opinion July 1, 1921 -----	75
<i>Maricopa & P. Ry. Co. v. Arizona</i> , 156 U. S., 347, 39 L. Ed. 447 -----	10
<i>Oklahoma Constitution</i> , Art. 10, Sec. 12 -----	5
<i>Oklahoma Session Laws</i> 1915, Chap. 164, Section 1 ---	15
<i>Oklahoma Session Laws</i> , 1908, Section 6 -----	15
<i>Oklahoma Laws</i> 1910, Section 7338 -----	16
<i>Oklahoma Session Laws</i> 1916, Chap. 39, Sec. 1 -----	17-21
<i>Peck & Company v. Lowe</i> , 247 U. S. 165, 62 L. Ed. 1049	15
<i>People ex rel Stafford v. Travis</i> (N. Y.) 132 N. E. 109 -----	12
<i>Railroad v. Peniston</i> , 85 U. S. 5, 18 Wall. 5 -----	23
Statutes and Constitution—	

STATUTES AND CONSTITUTION

<i>Oklahoma Constitution</i> , Sec. 12, Art. 10 -----	5
---	---

<i>Session Laws of Oklahoma</i> , Chap. 164, Sec. 1-----	5
<i>State v. Frear</i> , 148 Wis. 456, 134 N. W. 637-----	7-13
<i>Shaffer v. Carter</i> , 252 U. S. 37, 64 L. Ed. 445-----	12
<i>Session Laws of Oklahoma</i> 1908, Sec. 6-----	15
<i>Revised Laws of Oklahoma</i> 1910, Sec. 338-----	16
<i>Session Laws of Oklahoma</i> 1916, Chap. 39, Sec. 1---	17-21
<i>State v. Gillespie</i> -----	1
<i>Tyce Realty Co. v. Anderson</i> , 240 U. S. 115, 60 L. Ed. 554-----	7
<i>Thomas v. Gay</i> , 169 U. S. 264, 42 L. Ed. 740-----	9-24
<i>Thomson v. Railroad</i> , 67 U. S. 579-----	24
<i>Skelton Lead and Zinc Co. Gross Production Tax</i> ----	2-26
<i>United States Glue Co. v. Oak Creek</i> , 247 U. S. 321, 62 L. Ed. 1135-----	11
<i>William E. Peck & Co. v. Lowe</i> , 247 U. S. 165, 62 L. Ed. 1049-----	11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

No. 322.

F. A. GILLESPIE, *Plaintiff in Error*,

vs.

THE STATE OF OKLAHOMA, *Defendant in
Error*,

F. A. GILLESPIE, *Petitioner*,

vs.

THE STATE OF OKLAHOMA, *Respondent*.

Statement.

The opinion brought to the attention of the Court for review in this appeal is as follows:

State v. Gillespie, Supreme Court of Oklahoma,
April 5, 1921.

1. The validity of the income tax provided for in chapter 164, Sess. Laws 1915, as distinguished from a general ad valorem tax, is sustained.

2. The validity of the income tax provided for in chapter 164, Sess. Laws 1915, as applied to the lessee's private share of oil and gas produced under departmental leases on restricted lands, is sustained on authority of *In re Protest of Skelton Lease & Zinc Co.*, 197 Pac. 495, not yet (officially) reported.

HARRISON, C. J. This case is here upon appeal from the district court by the state of Oklahoma through its Attorney General. The decisive questions involved are: (1) Whether the income tax laws of this state are valid; and (2) whether the state has power to levy such a tax upon incomes derived from the lessee's private personal share of oil and gas produced under departmental leases upon restricted Indian lands.

As to the validity of an income tax in the abstract, as distinguished from a general ad valorem tax upon property, the validity of such tax has been so often sustained as to settle the question. See *Alderman v. Wells*, 85 S. C. 507, 67 S. E. 781, 27 L. R. A. (N. S.) 864, 865, and notes, 21 Ann. Cas. 193; *Tyee Realty Co. v. Anderson and Thorne v. Anderson* (consolidated) 240 U. S. 115, 36 Sup. Ct. 281, 60 L. Ed. 554, 555; *Peck & Co. v. Lowe*, 247 U. S. 165-172, 38 Sup. Ct. 432, 62 L. Ed. 1049; *Northwestern Mutual Life Ins. Co. v. State of Wisconsin*, 247 U. S. 132, 38 Sup. Ct. 444, 62 L. Ed. 1035; *State v. Frear*, 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L. R. A. 1915B, 569, 606, Ann. Cas.

1913A, 1147; *Black on Income Taxes*, § 187; and *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445, wherein it was held not only that the income tax of Oklahoma was not a burden upon interstate commerce, but also that the gross production tax of Oklahoma was equivalent to an ad valorem property tax. Upon these authorities and the provisions of article 10, § 12, Constitution of Oklahoma, and chapter 164, Sess. Laws 1915, the validity of the income tax therein levied is sustained.

As to the second proposition the question of validity of the precise tax here involved depends primarily upon the validity of the gross production tax provided for in chapter 39, Sess. Laws 1916, as applied to the lessee's private share of the products from departmental leases upon restricted lands, and the gross production tax being a property tax, as was held by the Supreme Court of the United States in *Shaffer v. Carter*, *supra*, the validity of which, as a property tax upon the same class of property here involved, was sustained by this court at this term in *Re Protest of Skelton Lead & Zinc Co.*, (No. 11194) 197 Pac. 495, not yet (officially) reported, then, upon the authority of said cases and the reasons therein given, the validity of the income tax involved herein is sustained.

The judgment of the trial court is reversed, with instructions to render judgment sustaining said tax and authorizing execution for the collection of same with costs of suit. Kane and Miller, JJ., dissent. All other Justices concur.

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The sole question to be determined in this case is whether or not the Oklahoma Income Tax Act, when applied to net income of an unrestricted white lessee derived from sale of production from oil operations upon restricted Indian lands, constitutes an unlawful burden upon a federal agency or instrumentality, and is therefore prohibited. As more briefly stated by the Oklahoma Supreme Court the question is "whether the state has power to levy such a tax upon incomes derived from the lessee's private personal share of Oil and Gas produced under departmental leases upon restricted Indian lands."

The validity of the tax will be urged by defendant in error upon two grounds, namely:

(1) That the tax, being levied upon the annual "net" income of the taxpayer a part of which income may have been derived from activities under a lease upon restricted land, is not a tax upon property of the Indian nor upon property of the lessee *connected with the development of the Indian lease*, and is, therefore, not within the rule announced in the Gross Production Tax Cases, heretofore decided by this court.

(2) That if said tax is determined to be within the rule announced in the Gross Production Tax decisions, a review of those cases will disclose that said decisions are erroneous as applied to the 1916 Act and should be overruled.

Argument Under Proposition One.

Is the State prevented from collecting Income Tax from an unrestricted lessee of Indian land derived from a sale of his personal share of Oil and Gas from a departmental lease upon the same considerations expressed in cases of:

Choctaw O. & G. Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27;

Indian Territory Illuminatory Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453;

Howard v. Gypsy Oil Co., 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426;

Large Oil Co. v. Howard, 248 U. S. 549, 39 Sup. Ct. Rep. 183, 63 L. Ed. 416.

The power to levy the income tax in question is derived from sec. 12, art. 10, of the Constitution, which is as follows:

“The Legislature shall have power to provide for the levy and collection of license, franchise, gross revenue, excise, income, collateral and direct inheritance, legacy, and succession taxes; also graduated income taxes, graduated collateral and direct inheritance taxes, graduated legacy and succession taxes; also stamp registration, production or other specific taxes.”

Pursuant to the power above conferred the Legislature of Oklahoma, by sec. 1, chap. 164, Session Laws 1915, enacted as follows:

“Each and every person in this State shall be liable to an annual tax upon the entire net income of such person arising or accruing from all sources during the preceding calen-

In order for the court to readily understand that the application of law made in the gross production tax cases cannot obtain as to net income taxation, it is only necessary that the nature of income taxation be noticed.

Income has been set apart and classified by the Legislature as a separate and independent taxable entity, regardless of its source, and for the purpose of taxation such income has no relation to any particular property or business.

In defining income, Mr. Black, in Sec. 187, 2d ed. of his work on Income Taxation, uses this language:

"An income tax is distinguished from other forms of taxation in this respect, that it is not levied upon property, nor upon the operation of trade and business, or the subjects employed therein, nor upon the practice of a profession or the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources or from all combined, annually, or at other stated intervals."

It will be seen from the above that income taxation is distinguishable from other forms in that the tax is assessed upon *income*, as such, instead of upon the property or the operation of a trade, business or profession from which said income may have been derived.

It has been held by all the courts of last resort, including the United States Supreme Court, that income, and not the source of the income, constitutes the taxable entity.

See *Commonwealth v. Werth*, 116 Va. 604, 82 S. E. 695, Ann. Cas. 1916 D, 1263, wherein this language is used:

"The subject matter of Schedule D of the tax bill is 'income' and not the source from which it is derived. * * *"

In the case of *Tyee Realty Co. v. Anderson*, 240 U. S. 115, 60 L. Ed. 554, the court, in attempting to show that income taxation is not a tax upon the source of the income, speaks as follows:

"The whole purpose of the United States Constitution's Sixteenth Amendment, giving Congress the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census of enumeration, was to *exclude the source from which a taxed income was derived* as the criterion by which to determine the applicability of the constitutional requirements as to the apportionment of direct taxes."

Income tax is distinguished from ad valorem taxation by the fact that ad valorem taxation is a direct tax upon the property as such. It is distinguished from occupation tax by the fact that it is not a tax upon the operation of a trade or business. It is distinguished from a license tax in that it is not a tax upon privilege. It is simply a direct tax upon income of the individual, acquired within the given time and for the purpose of levying and collecting it, its source is not to be considered.

Income from property, which property is exempt from all sorts of taxation, is nevertheless taxable, because it is not a tax upon the property. The

only instance in which income from a given property is exempt from taxation is when the Legislature exempted the *income* of such property from taxation, as in the case of one of the Liberty Bond issues.

In *State v. Frear*, 148 Wis. 456, 134 N. W. 637, 26 Am. & Eng. Ann. Cas. 1147, the court says:

"Words could hardly be plainer to express the idea. From them it clearly appears that *taxation of property* and *taxation of incomes* are recognized as two separate and distinct things in the state constitution. Both may be levied and lawfully levied because the constitution says so. However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that 'property' means one thing and 'income' means another; in other words, that income taxation is not property taxation as the words are used in the Wisconsin Constitution."

Having the above conception of income taxation in mind, it could not be said that because such income was derived from the sale of the lessee's share of oil and gas, which oil and gas was derived from restricted Indian lands by the lessee, that such income was exempt from taxation on the ground that it constituted an unlawful burden upon a Federal agency or instrumentality. The income sought to be taxed, it must be borne in mind, is net income determined after the close of preceding year's business, and when it has been determined that less all expenses and necessary expenditures of every nature—there still remains in the hands of the taxpayer a net income. This net income so remaining

is the thing that is taxed, and its taxation could not possibly amount to a burden upon the exercise of a Federal agency. It is going far afield for courts to hold that to tax the lessee of a restricted Indian leasehold upon his share of gross production of oil and gas, or other mineral, is indirectly taxing the exercise of a Federal agency, and is, therefore, invalid; but to go a step farther and say that to require such lessee to include in his income tax returns net income derived from such source imposes a like burden, would be carrying the idea of guardianship into too remote a channel to meet the practical application of taxing laws. The theory upon which such contention is made is that a prospective buyer of an Indian lease, knowing he would have to pay income tax upon his net annual acquisition of wealth therefrom, would pay less for the lease than he would otherwise pay, that such tax would have a deterring influence upon the purchasers of Indian leases. Such argument resolves itself into a question of degrees. There would be no stopping point if the application of the principle be logically carried forward.

This contention was made in reference to grazing leases on Indian lands that if the cattle of the lessee were taxed he would pay less for the lease to the Indian. This court answered that contention in case of *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340, as follows:

"But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *N. Y., Lake Erie & W. Ry. Co. v.*

Pennsylvania, 158 U. S. 431. There the state of Pennsylvania had imposed a tax upon a railroad * * * engaged in carrying on interstate commerce, and this tax was measured by reference to the amount of the tools received. * * * It was claimed that the imposition of a tax on tolls might lead to increasing them * * * and * * * become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden upon interstate commerce."

In *Maricopa & P. Ry. Co. v. Arizona*, 156 U. S. 347, 39 L. Ed. 447, this court said:

"The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is too remote and indirect to be regarded as an interference with the legislative power of Congress.

These views sufficiently dispose of the objections urged against the power of the legislative assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians."

The above suffices to show the fallacy of the contention that such a tax invades the rights of the government from that standpoint.

The Supreme Court of the United States has fully recognized this principle in making application of the Interstate Commerce laws to net income taxation, specifically holding in *The United States*

Glue Co. v. Oak Creek, 247 U. S. 321, 62 L. Ed. 1135, that such tax does not constitute a burden upon interstate commerce, inasmuch as it is a *net* income tax, and only attaches after all the acts of commerce for the given period have been accomplished and completed, using this language: "A state in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce, without contravening the commerce clause of the Federal constitution, where there is no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it."

In *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. Ed. 1049, in construing the Federal income tax law, the court said:

"Act Cong. Oct. 3, 1913—subjecting every domestic corporation to an annual tax upon its entire income arising or accruing from all sources during the preceding calendar year, is not invalid under Const. declaring that no tax or duty shall be laid on articles exported from any state, in so far as the act applies to income derived by a corporation from its export trade, for the constitutional inhibition merely prohibits its export taxes or any tax directly burdening exportation, while the tax imposed by Act of 1913 is *only upon the net income derived from export business after the transaction is complete.*"

In the body of that opinion the court observes as follows:

"It is not laid on income from exportation because of its source, or in a discriminative

way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is so far removed from exportation as are articles intended for export before the exportation begins."

In *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445, it was said:

"A state income tax upon the net income of a non-resident from the business carried on by him in the state is not a burden upon interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being on the gross receipts, *but only upon the net proceeds*, is plainly sustainable *even if it includes net gains from interstate commerce*."

In a very recent case decided by the Supreme Court of New York, May 31, 1921, *People ex rel. Stafford v. Travis*, — New York —, 132 N. E. 109, the court said:

"The relator objects that the tax is invalid because it is imposed upon interstate commerce in violation of the United States Constitution, and upon exports in violation of the United States Constitution, and upon imposts or duties laid by the state on exports without the consent of Congress in violation of the United States Constitution. These objections are without merit because the tax is not imposed upon the goods which were handled by him in his busi-

ness in this state, nor upon the gross receipts from such business, but simply from the net income of the business. Such a tax is sustainable even if in the conduct of such business goods are received by interstate transportation and are ultimately exported from the State of New York.

"*Shaffer v. Carter. supra*, 252 U. S. 57, 40 Sup. Ct. 221, 64 L. Ed. 445. A tax upon net income from whatever source arising is but a method of distributing the cost of government; and, if there be no discrimination against interstate commerce either in the admeasurement of the tax or in the means adopted for enforcing it, it does not interfere with the power of Congress to regulate commerce among the states. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918 E. 748. The tax is upon the net income of the business carried on by the relator in this state after all expenses and losses are adjusted and the exportation of the goods accomplished. The net income is then but the result of the business carried on or conducted, and such a tax is not laid on articles exported from any state within the meaning of United States Constitution."

No more could the state taxes upon net income be declared to be a burden upon the exercise of a Federal agency or instrumentality, than it could be a burden upon interstate commerce, or upon exportation. The tax does not attach upon the transaction or concurrently with its happening, but is an after consideration after all of the functions of the Federal agency have been performed freely and untrammelled, and after the lessee has received his compensation and it has been determined that, after the close of his year's business, it is found that he

has in his possession a net income, then the tax attaches. To hold the tax a burden upon the lease would be to repudiate the entire scheme of "net income" taxation; that is, the net income regarded as a taxable subject matter severed from its source. The income when it has reached the stage at which the state attempts to tax it has become the individual acquisition of the taxpayer as completely as any other form of ownership represented by property and may be invested in other enterprises not connected with the business from which it came. To deny that proposition denies the power of the state to designate income as a subject of taxation. You cannot say that "net income" is taxable regardless of its source, and at the same time deny the tax because of its source.

From the foregoing it clearly appears that the doctrine applied in the Gross Production Tax Case can in no way be decisive of the validity of the tax involved here.

PROPOSITION TWO

Argument Under Proposition Two.

If, however, the court should determine that the rule announced in the Gross Production Tax Cases does apply to the Income Tax Act of Oklahoma, then defendant in error respectfully asks to be heard in an effort to show that the rule announced in the de-

cided cases going up from Oklahoma were not determined with reference to the 1916 Act of the Oklahoma Legislature, and, as applied to said Act of 1916, the holding in the former cases, to-wit: the *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453; would be incorrect; and, further, that in determining the cases of *Howard, Auditor, v. Gypsy Oil Co.*, and *Consolidated Cases*, 247, U. S. 502, 62 L. Ed. 1239 and *Large Oil Co. v. Howard*, 248 U. S. 549, 63 L. Ed. 416, which did involve the 1916 Act of Oklahoma, they were decided without reference to said Act and without a careful regard to its provisions, but upon the theory that the statute involved was the former one heretofore construed and those cases should, therefore, be overruled. A review of the several statutes involved is necessary in presenting this phase of the case at bar. The case of *Choctaw, O. & G. R. Co. v. Harrison*, *supra*, involved the Oklahoma Gross Revenue Tax act of May 26, 1908, section 6. which said section in so far as applicable reads as follows:

"Sec. 6. Every person, firm, association, or corporation engaged in the mining, or production, within this state, of coal, or asphalt, or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other mineral oil or of natural gas, shall, within thirty days after the expiration of each quarter annual period expiring respectively on the first day of July, October, January and April of each year, file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine, or oil or gas well operated

by such person, firm, association or corporation during the last preceding quarter annual period, the kind of mineral, oil, or gas; the gross amount thereof produced; the actual cash value thereof; and such other information pertaining thereto as the State Auditor may require, and shall at the same time, pay to the State Treasurer a gross revenue tax, which shall be in addition to the taxes levied, and collected upon an ad valorem basis upon such mining, oil, or gas property and the appurtenances thereunto belonging, equal to three per centum of the gross receipts from the total production of coal therefrom; or one-half of one per centum of the gross receipts from the total production of ores bearing lead, zinc, jack, gold, silver, or copper, or of asphalt; one-half of one per centum of the gross receipts from the total production of petroleum, or other mineral oil, or of natural gas; Provided, however, that the State Auditor shall have power to require any such person, firm, or corporation, engaged in mining or the production of minerals, to furnish any additional information by him deemed to be necessary for the purpose of computing the amount of said tax, and to examine the books, records and files of such person, firm, association, or corporation; and shall have power to examine witnesses, * * *

The case of *Indian Territory Illuminating Oil Co. v. Oklahoma*, *supra*, involved Section 7338 Revised Laws of Oklahoma 1910, which reads as follows:

“Every public service corporation organized, existing or doing business in this State shall on or before the last day of February of each year return sworn lists or schedules of its taxable property as hereinafter provided, or as may be required by the State board of equalization,

and such property shall be listed with reference to amount, kind and value on the first day of February of the year in which it is listed; and said property shall be subject to taxation for state, county, municipal, public school and other purposes, to the same extent as the real and personal property of private persons."

while the cases of *Howard v. Gypsy Oil Co.* and *Howard v. Indian Territory Illuminating Oil Co.* and *Howard v. Barnsdall Oil Co.*, and *Large Oil Co. v. Howard*, *supra*, decided upon the authority of the foregoing cases, involved Chapter 39 of the Oklahoma Act of 1916, Section 1 of which reads as follows:

"Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine, or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other informa-

tion pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this Act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

"The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein, to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce

any book, record or file to the district court of this state having jurisdiction of the party, and said court shall thereupon issue a summons for said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

"The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the State Auditor shall ascertain the correct amount of either, and compute the said tax.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities, upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actu-

ally used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than herein enumerated, and oil in storage, asphalt and ores hereinbefore named mined, produced and on hand at the date as of which property is assessed for general and *ad valorem* taxes for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

“The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general *ad valorem* tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said Board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and like effect as provided by law in other appeals from said Board to said Court; provided, that after such tax has been collected

and distributed or paid without protest, no complaint with reference to rate shall be heard or considered."

Mr. Justice McReynolds, speaking for the Court, in the case of *Choctaw, O. & G. R. Co. v. Harrison*, *supra*, in dealing with the 1908 statute, in the body of the opinion said:

"But it is insisted that the statute, rightly understood prescribed only the ad valorem impositions on the personal property owned by appellant,—the coal at the pit's mouth which is permissible, according to many opinions of this court. *Thompson v. Union P. R. Co.*, 9 Wall. 579, 19 L. Ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766; *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340."

The first time the 1916 Act was discussed by this court was in the case of *Shaffer v. Carter*, 352 U. S. 37, 64 L. Ed. 445; wherein the court speaking through Mr. Justice Pitney, in paragraph 8 of the Syllabus, used this language:

"The Oklahoma gross production tax imposed upon those engaged in producing oil or natural gas within the state, in lieu of all taxes imposed by the state, counties, or municipalities upon the land or the leases, mining rights, and privileges, and the machinery, appliances, and equipment pertaining to such production, does not relieve a non-resident of the payment of the income tax imposed by that state upon the net income derived by non-residents from oil operations within the state. The gross production tax was intended as a substitute for the ad valorem tax, but not for the income tax, and there is no such repugnance between it and the in-

come tax as to produce a repeal by implication."

This brings the case, in the light of the 1916 Gross Production Tax Act, squarely within the rule announced by the court in the *Choctaw, O. & G. Co.* case, above referred to, that is, that a property tax upon the agent's separate personal property is valid and has been sustained by a long line of decisions by this court. In the body of the opinion in the *Shaffer v. Carter* case, in referring to the 1916 Oklahoma Gross Production Tax Act, the court, in answer to the contention that the gross production tax was in lieu of income tax, used this language:

"We overrule the contention, deeming it clear as a matter of construction, that the gross production tax was intended as a substitute for the ad valorem property tax. * * *"

Then it must bear the same construction and interpretation as would be applied to the ad valorem property tax. There could be no possible distinction, other than one too fanciful to meet the serious consideration of the court, between taxing the coal at the top of the mine and the oil in the tank beside the well. The Oklahoma Act in taxing mercantile companies on their stocks of goods levies a tax upon the average invoice of merchandise carried throughout the year, a mere measure to determine an equitable basis for taxing his goods. The gross production tax adopts a similar measure, that is, the gross quantity of actual ore or gas or oil produced. It would be impracticable to require the oil producer to severally list each volume of oil pumped from the well or to hold same in storage until the taxing officer could actually assess it, so

in order not to hamper or interfere with such commerce the State for the benefit and convenience of the oil operator has permitted him to report the quantity of oil from his records and render the same for taxation.

The last quoted section of the 1916 Act removes any possible room for doubt as to the correctness of the position assumed by the State of Oklahoma in the instant case. It is provided in said section that the State Board of Equalization on its own initiative may, and upon complaint must, equalize the gross production tax upon oil and gas and other ore bearing minerals with the ad valorem tax by raising or lowering the rate so that the taxpayer will pay no more nor less than a taxpayer would pay upon the same property on an ad valorem basis.

This court has often held that it will look beyond the form of a tax law and ascertain its legality by determining its effect. The effect of the gross production tax of Oklahoma—1916—being a substitute for the ad valorem tax and based purely upon the value of the ore or oil and gas cannot be held to be other than in fact an ad valorem property tax. Treating the gross production tax then as a property tax or substitute for a property tax this court in the case of *Railroad v. Peniston*, 85 U. S. 5, 18 Wall. 5, announces the law as follows:

“The exemption of agencies of the Federal government from taxation by the States is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question

whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of their power. A tax upon their *property* merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the States. * * *

In *Thompson v. Railroad*, 76 U. S. 579, sections 1 and 2 of the syllabus reads as follows:

"1. Although, confessedly, Congress may constitutionally make or authorize contracts with individuals or corporations for services to the government; may grant aids by money or land in preparation for and in the performance of such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution, and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them; yet in the absence of all legislation on the part of Congress to indicate that such an exemption is deemed by it essential to the full performance of the party's obligations to the government, the exemption cannot be applied to the case of a corporation deriving its existence from State law, exercising its franchise under such law, and holding its property within State jurisdiction and under State protection, only because of the employment of the corporation in the service of the government.

"2. The point decided in *McCulloch v. Maryland* does not establish a broader doctrine even if some of its reasoning may seem to do so."

In *Thomas v. Gay*, 169 U. S. 264, paragraph 1 of the syllabus:

"The act of the legislature of the Territory of Oklahoma of March 5, 1895, c. 43, which provided that 'when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district or reservation of this Territory, such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes,' was a legitimate exercise of the Territory's power of taxation, and, when enforced in the taxation of cattle belonging to persons not resident in the Territory grazing upon Indian reservations therein, does not violate the Constitution of the United States."

In this case it was held that the tax on the cattle was too remote to be a burden on the lessee and the lease treated as government agencies.

Applying the analogy, a tax on the lessee's individual share of the oil and gas separated from the Indian's portion would be just as remote as the tax on the cattle. It has been asserted that if he knew he would be taxed the oil man would pay less for the lease from the Indian. If the cattle man knew he would have to pay a tax on the cattle and their offspring, growing out of the pasturing of the leased premises for stock growing purposes, he would be as much inclined to be influenced in the price he would pay for the lease as would the oil man.

Applying the above cases to the case at bar we could for the sake of a decision in this case concede plaintiff in error's contention that the income tax is a tax upon the property of the lessee, and still successfully sustain its validity.

It must be noted by this court that the Oklahoma Legislature in the Act itself has specifically exempted all property which is exempt under the laws of the Federal government and the tax is laid upon the value of the ore or oil, with the proviso that the rate must be so adjusted by the Board of Equalization that it corresponds with the *ad valorem* tax in amount. If this sort of tax violates any provision of law or burdens the arm of the government, it is difficult indeed to determine a taxing scheme that will raise revenue from all sources of property within the State and cause all property to alike bear its proportionate burden of the State government.

The Supreme Court of this State in a very able opinion written by its foremost student of taxation has announced the doctrine herein contended for, and sustained it by ample reasoning supported by conclusive authority. We quote the opinion in full and invite its earnest consideration by this court:

IN RE SKELTON LEAD & ZINC CO.'S GROSS
PRODUCTION TAX FOR 1919.

(Supreme Court of Oklahoma. April 5, 1921.)

(Syllabus by the Court.)

1. *Taxation—Gross production tax on oil and gas is substitute for ad valorem property tax.*

Under chapter 39, Sess. Laws Ex. Sess. 1916: "The Oklahoma gross production tax, imposed on oil and gas [lead and zinc] producing companies, was intended as a substitute for the *ad valorem*

property tax." *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445.

2. *Taxation—Gross production tax held a "property tax" in lieu of all other taxes.*

The "gross production tax" levied under chapter 39, Sess. Laws Ex. Sess. 1916, is a "property tax" purely, and is levied in full and in lieu of all other taxes, state, county, township, district and municipal.

3. *Taxation—Statute held to provide for lowering rate of gross production tax to conform to value.*

Under chapter 39, Sess. Laws Ex. Sess. 1916, plain and adequate provision is made for lowering the rate of "gross production tax" so that it will exactly conform to the general ad valorem rate of "property tax" upon other property in the state.

4. *Taxation—Property exempt under Indian treaties or federal laws not taxed.*

Under article 10, § 6, of the Constitution of this state, and under section 7303, Rev. Laws 1910, all such property as may be exempt by reason of treaty stipulations between the Indians and the United States or by federal laws is expressly exempt from taxation by the state.

5. *Taxation—Royalties to Indians from leases on restricted lands not taxable by state.*

Under chapter 39, Sess. Laws Ex. Sess. 1916, the royalties due the Indians from oil, gas, and mineral leases under federal supervision and upon restricted lands are not made taxable and are not taxed by the state.

6. *Taxation—Value of mineral lease on restricted Indian lands not an element of value.*

Under said chapter 39, the value of an oil, gas, or mineral lease, as such, upon restricted lands and under federal supervision, is not to be considered and is not considered as an element of value in making up the assessment rolls.

7. *Taxation—Requirement of report of value of mineral leases inapplicable to restricted Indian lands.*

The provisions, in section 1, c. 39, Sess. Laws Ex. Sess. 1916, requiring oil, gas, and mineral lessees to report the value of leases to the State Auditor, apply to such leases only as are not on restricted lands nor under federal supervision, and are not intended to apply and do not apply to leases on restricted Indian lands under federal supervision.

8. *Licenses—Gross production tax not an "occupation tax."*

The "gross production tax" provided for in chapter 39, Sess. Laws Ex. Sess. 1916, is not an "occupation tax."

9. *Taxation—Gross production tax held not imposed on federal agency.*

The tax imposed by chapter 39, Sess. Laws Ex. Sess. 1916, is not upon a federal agency, nor upon the right to exercise or operate a federal agency, but is upon the lessees' individual private property.

10. *Licenses—Taxation—"Occupation taxes" and "property taxes" defined and distinguished.*

“Occupation taxes” and “property taxes” are clearly distinct from each other in both species and function, distinctly different in object, purpose, and mission.

The primary purpose, mission, or function of an “occupation tax” is to regulate and control a given occupation or class of business.

The only mission or function of a “property tax” is to raise revenue; when the revenue is collected, its mission is fulfilled.

The basis of authority for an “occupation tax” lies in the police power, and its validity depends upon the extent of the police power to regulate and control a given subject.

The basis of authority for the “property tax,” for necessary revenue, lies in the inherent power of government itself, and its validity is determined, not by the question of power to levy, but by statute and constitutional provisions, which limit and equalize the rate, and governing the manner of valuation and assessment.

11. *Licenses—State cannot impose occupation tax on exercise of federal agency.*

A state has no power to regulate or control the exercise of a federal agency; hence it has no power to impose an “occupation tax” upon the right of exercising a federal agency.

12. *Taxation—State has power to impose an ad valorem tax upon all property under state protection.*

A state has inherent power to raise the necessary revenue for state government; hence it has

power to impose an "ad valorem tax" upon all property which must look to the state for protection and which the state is obligated to protect.

13. *States—State and federal governments mutually dependent upon each other.*

Under our dual system, the state and federal governments are mutually dependent upon each other, and equally so; the exercise of the proper functions of each being essential to that of the other, and the proper operation of both being essential to the existence of our dual scheme of government.

14. *Taxation—Gross production tax is a method of ascertaining fair cash value of mining operation.*

The provision in chapter 39, Sess. Laws Ex. Sess. 1916, for the payment of a sum equal to 1½ per cent. of the gross value of lead and zinc products is merely a means or measure adopted by the Legislature for ascertaining the fair cash value of the mills, plants, machinery, equipments, and other property used in the operation thereof, as a going concern.

15. *Taxation—Property of oil and gas lessee subject to state taxation; gross production tax valid.*

The mills, plants, machinery, equipments, and all other property, being exclusively the private property of the lessee, and having a situs within this state, and not being exempt by law, are subject to state taxation, and the "gross production tax," being merely a measure for ascertaining the fair cash value of such property, is a valid tax.

Kane and Miller, JJ., dissenting.

Appeal from State Board of Equalization.

Proceeding to impose a gross production tax on the property of the Skelton Lead & Zinc Company. From an order of the State Board of Equalization overruling a protest, the corporation appeals. Affirmed. Vern E. Thompson, of Miami, for plaintiff in error. S. P. Freeling, Atty. Gen., and C. W. King, Asst. Atty. Gen., for defendant in error.

HARRISON, C. J. This case is here upon appeal from an order of the State Board of Equalization overruling protest of Skelton Lead & Zinc Company against payment of its "gross production tax."

The order appealed from was made upon an agreed statement of facts in substance as follows: That the taxes for 1919 amounted to \$2,033.56; that they were estimated upon the value of gross production of lead and zinc from protestant's mines; that the mines were operated under leases upon restricted lands of the Quapaw Indians, said leases having been made under authority of the act of Congress approved June 7, 1897 (30 Stat. 72); that most of said leases were upon lands belonging to allottees that had been adjudged incompetent, but some were upon lands whose owners had not been so adjudged; and that should a distinction be made between the lands of competents and those of incompetents, as to their liability for taxation, the taxes, then, should be calculated accordingly.

It was also agreed that the lead and zinc company had erected on said lands a number of con-

centrating plants (five, it appears from the protest filed), in each of which plants there had been installed machinery and devices for the purpose of hoisting, smelting, and cleaning the ores produced from the mines; that said plants, machinery, and equipments were necessary in order to produce said ore and prepare same for market, and were used exclusively for such purpose; and that no ad valorem tax had been paid on said plants, equipment, etc., for said year.

It was further agreed that said statement of facts be submitted to the Board of Equalization for a final decision: (1) As to whether or not the ore from said leases or any of same is subject to the gross production tax; (2) whether or not the concentrating plants and machinery and equipment are subject to an ad valorem tax.

It appears that no ad valorem tax had been levied on any of said property. Protestant claims that the plants, machinery, and devices are not subject even to an ad valorem tax, and that the ores produced are not subject to a gross production tax; that the plants, machinery, and other tangible effects, being necessarily used in the operation of leases under federal supervision, are federal instrumentalities, and therefore not subject even to an ad valorem tax; and that the gross production tax is an occupation tax, and that the ores obtained, being the products of a federal agency, are not subject to an occupation tax.

These two propositions, however, are assigned as follows: (1) Are the improvements, the plants, and machinery upon, and the ore obtained from,

leases belonging to allottees who have been adjudged incompetent subject to either an ad valorem or a gross production tax; (2) are the improvements, the plants, and machinery upon, and the ore obtained from, leases belonging to allottees who have not been adjudged incompetent subject to either an ad valorem or a gross production tax.

In this connection, we take occasion to say, in justice to protestants and to the counsel who briefed the case, that these questions are submitted with utmost fairness and frankness, without attempt to distort or evade the real provision of statutes, and without resort to subterfuge in their argument.

As to whether there may be or should be a distinction made between the two classes of allottees as to liability for taxes is not necessary to determine. The tax is not levied upon anything belonging to either class of Indians, nor anything in which either class of Indians or the government has any ownership, or over which either exercises any control.

Article 10, § 6, of the state Constitution, expressly exempts all "such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws." Section 7303, Rev. Laws 1910, subd. 8, expressly exempts all "such property as may be exempt by reason of treaty stipulations, existing between the Indian and the United States government, or by federal laws." Section 1, c. 39, Session Laws Ex. Sess. 1916, the statute under which the tax in question was levied, expressly exempts all "such royalty interests as are exempted from taxation under the laws of the United States."

Hence the statute does not impose either an ad valorem or a gross production tax upon any of the property of the Indians, nor upon the royalties due them from the lessees.

As we interpret the statute, it seeks merely to levy a property tax upon the lessees' individual personal property, such tax to be estimated upon the gross value of the lessees' private personal share of mine products after such share has been separated from the royalties due the Indians and taken into the lessees' own exclusive possession and private control; such rate of tax to be no greater nor less than the general ad valorem rate upon other taxable property within the state, and to be in full and in lieu of all other taxes upon the entire property. Hence the question of the taxability of the Indian's property or his share of the mine products is not in the case. His property is expressly left out of the levy, and is not involved.

The direct question involved here is whether the lessees' individual personal property is subject to a property tax, the same rate of property tax to which other property within the state is subject, or whether, being fortunate enough to have obtained a lease upon Indian lands, his personal property, by reason of such fact, shall be immune from taxation.

In deciding this question, we bear in mind that the tax in question is not levied upon the mine products themselves, but, as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., "as a going concern," the value of which as a going concern and the reason-

ableness of the rate upon which is to be ascertained by the gross value of the products.

Chapter 39, § 1, Session Laws Ex. Sess. 1916, provides that the mine operator shall make reports showing "the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, * * * and shall at the same time pay to the state auditor a tax [not upon the products themselves, but a tax] equal to one-half of 1 per centum of the gross value" of the mined products.

The same section provides also that—

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities * * * upon the machinery, appliances and equipment used in and around any well * * * and also upon the oil, gas, asphalt or ores * * * during the tax year in which the same is produced."

Thus it appears that the sole object of the Legislature was to adopt a practicable means for ascertaining the fair cash value of these smelting plants and equipment "as going concerns," and to levy a property tax thereon according to such value, and, deeming the gross value of the products therefrom as a fair and practicable measure for ascertaining such value, it adopted such measure and levied a tax which it specifically provided should be "in full and in lieu of all other taxes," and which should be no greater nor less than the general ad valorem

rate of property tax upon other property within the state, assessed at its fair cash value. And in order to attain this object and to provide adequate means for its attainment, the same act, chapter 39, Session Laws Ex. Sess. 1916, p. 105, provides that—

“The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court in like manner and with like effect as provided by law in other appeals from said board to said court.”

From this it is clear that the Legislature had no other object than to levy a property tax upon mining property according to its fair cash value, using the measure therein adopted for ascertaining such value, and providing the means therein provided for correcting any mistakes which might result from overvaluation or excessive rate. See *Exchange*

Oil Co. v. State, (No. 11355) 193 Pac. 999, not yet officially reported.

While the Board of Equalization has no power to lower the valuation, it does have the power and it is expressly made its duty to lower the rate, which has the same effect. The valuation, it will be observed, is largely and in most cases wholly made upon the sworn reports of the mine operator. It was therefore unnecessary to give the board authority to lower the valuation, but was necessary to give it power to lower the rate so as to make it exactly conform to the general property tax levied upon other property upon the basis of its fair cash value. No complaint is made as to the rate being excessive or higher than the ad valorem rate upon other property.

The statute provides further that if any such products remain unsold and in the state for the succeeding tax year, they shall then be assessed as other property upon the general ad valorem basis.

Therefore we cannot sustain the contention that this is any other than a property tax.

The case *In re Gross Production Tax of Wolverine Oil Co.*, 53 Okla. 24, 25, 154 Pac. 363. L. R. A. 1916F, 141, in so far as it held the gross production tax, chapter 107, Sess. L. 1915, which was similar in purpose to the tax under consideration here, to be not a property tax and not a substitute for the general ad valorem tax, is hereby overruled.

There is nothing in the act that sustains such contention. The only plausible reason we see for contending that it is an occupation tax is that if it

is such a tax, the leasing of restricted lands being a federal instrumentality, then the state has no power to levy such a tax upon the privilege of exercising a federal instrumentality. That the operation of this character of leases is a federal instrumentality we readily concede. That question was decided in *Choctaw O. & G. Ry. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234, and *Ind. Ter. Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779. Likewise, the proposition that the state has no power to levy a tax upon the privilege of operating a federal instrumentality is conceded. That question also was settled more than 50 years ago in *Thompson v. Union Pac. R. Co.*, 76 U. S. (9 Wall.) 592, 19 L. Ed. 792, wherein Mr. Chief Justice Chase, who delivered the opinion, said:

“But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally, taxation of the means.”

We fully realize that the state has no power to levy an occupation tax upon an agency of the government, and, as a matter of fact, it has never sought to exercise such power, but we hold that it does have authority to levy a property tax upon the private property of the agent—when such property has a situs within the state.

There is no excuse for a confusion of the two kinds of taxes, occupation taxes and property taxes. They are separate and distinct species of taxes, as distinct from each other in their kind and in their

mission as tort and assault. A tax is an "occupation tax" or a "property tax" according to what it actually is, the same as a lens is concave or convex, or a coin is silver or gold. They are essentially different, in both their character and their mission; the sole mission or function of a property tax being to raise revenue, and when the revenue is collected its mission is fulfilled. It never imposes any conditions nor places any restrictions upon the use of property nor the exercise of a privilege. The mission of a "license tax," "occupation tax," or "privilege tax," or by whatever name this species of tax may be called, is always to regulate a given business, or control the right to engage in a given occupation. It is imposed as a condition or as an element of the conditions upon the right to exercise a given privilege, its primary mission being to regulate and control, and while the tax itself may not always be the sole condition, yet its payment is invariably made a part or a factor in the conditions upon which a business may be conducted by the statute under which such tax is levied. In other words, the primary object and purpose of every statute which levies an occupation tax is to regulate the conduct of the business affected.

The kind of a tax or the species to which it belongs is not made by giving it a name, nor its species changed by changing its name, either by legislative enactment or by judicial decree. It is a property tax or an occupation tax according to the mission given it by the law under which it is levied.

The power to levy the two taxes is derived from different sources of government—the occupation

tax from the police power to regulate, while the property tax is from the power to raise revenue. The validity of the two taxes is tested and determined under different principles of law. The validity of an occupation tax is determined by the question whether a state has the power at all to levy such a tax—whether it is at all within the police power of a state to impose such a tax, with its attendant regulatory conditions. The validity of a property tax is not determined by whether a state has power to levy such a tax because such power is inherent, the power to raise the necessary revenue for government being inherent in the very fact of government itself, and the validity of such a tax is determined by the law governing its rate, its uniformity, its reasonableness or excessiveness, or whether it is discriminatory or confiscatory, or whether the manner of its assessment and collection is regular or irregular or constitutes “taking without due process of law,” or amounts to “denial of equal protection under the law.” The basis of an occupation tax lies in the police power to regulate, but the basis of a property tax is “inherent” in the very fact of governmental protection of property. The fact that the proceeds of an occupation tax may constitute a portion or the sole source of revenue does not change its mission, nor make it any the less an occupation tax. Nor does the fact that an occupation tax is levied upon an ad valorem basis render it any the less an occupation tax. This method is quite frequently adopted, and in some cases might be the most just and reasonable measure for such a tax. Both kinds of taxes may be levied upon the same property, and both be levied upon an ad valorem

basis, and both be valid. Or both may be invalid; the property tax because it is excessive or discriminatory, and the occupation tax because the state has no power to levy it. Neither does the fact alone that a given tax may be a burden upon a given business constitute a test as to what kind of a tax it is, nor does the amount or weight of such burden alone constitute a test as to its validity. A tax may be a very onerous burden, and still be perfectly valid, or it may be so very slight as to constitute no perceptible burden, and yet be wholly invalid; nor does the fact alone that the weight of such burden be indirectly upon a federal agency either change the character of a tax or constitute an exclusive test as to its validity. See *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 374, 2 Sup. Ct. 257, 27 L. Ed. 419; *Western Union Tel. Co. v. Atty. Gen. of Mass.*, 125 U. S. 550, 551 8 Sup. Ct. 961, 31 L. Ed. 790. For further illustration: In *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740, a tax of 24 mills on the dollar levied by Oklahoma Territory upon cattle grazed upon an Indian reservation under a federal lease was held to be a valid tax because it was a property tax within the proper scope of the power to raise revenue, and yet, if the territory had sought to impose a tax of one-tenth of one mill upon the mere right to graze cattle upon such reservation, the payment of such tax being made a condition upon the mere right to exercise such federal agency, such tax would at once have been declared invalid, yet the burden of such tax upon such federal instrumentality would have been only $1/240$ part as heavy as the tax which the court held to be valid; the reason being that the lighter tax was one which

in the very nature of our dual form of government a state has no power to levy, it being an occupation tax, while the other tax, the property tax, though 240 times as great, was held to be valid, being upon the lessees' private property having a taxable situs within the territory. The same questions were involved, and same decision rendered in *Wagoner v. Evans*, 170 U. S. 588, 18 Sup. Ct. 730, 42 L. Ed. 1154.

Upon the same principle the "net proceeds tax" of Nevada was held to be valid in *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313.

And the Colorado "gross products tax" upon mining claims from the government was upheld in *Elder v. Wood*, 208 U. S. 226, 227, 28 Sup. Ct. 263, 52 L. Ed. 464.

Upon the same principle the "gross receipts tax" of Minnesota was upheld in *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459.

And in *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801, the Porto Rican tax was held to be valid.

Therefore the weight of attacks or its effect in dollars and cents, is not of itself a test of its validity nor of its kind.

A property tax constitutes a burden upon a given business only to the extent of the amount of the tax, but an occupation tax with its ancillary conditions, if not paid, may stop the business altogether. We must conclude therefore that the present tax is a property tax.

But it is contended that the state is foreclosed from levying a tax upon this class of property by decisions of the Supreme Court of the United States, and that this court is bound by such decisions. Let us see. The decisions relied upon as foreclosing the state and as being binding upon this court are *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. 234; *Ind. Ter. Ill. Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779; *Large Oil Co. v. Howard*, 248 U. S. 549, 39 Sup. Ct. 183, 63 L. Ed. 416; *Howard v. Gypsy Oil Co.*, 247 U. S. 504, 38 Sup. Ct. 426, 62 L. Ed. 1239.

Upon examination of these decisions, however, we find that only one of them (*Choctaw Ry. Co. v. Harrison*) even mentions the question whether the state has power to levy a property tax upon the lessee's personal share of mine products, and in that decision it is said:

"But it is insisted that the statute, rightly understood, prescribed only an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth—which is permissible, according to many opinions of this court. *Thomson v. Union P. R. Co.*, 9 Wall. 579, 19 L. Ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766; *Thomas v. Gay*, 169 U. S. 264, 42 L. Ed. 740, 18 Sup. Ct. Rep. 340."

Neither of the other decisions even mentions the question, and none of them, not even *Choctaw Ry. Co. v. Harrison*, makes the slightest reference to the statute under consideration here. In *Choctaw Ry. Co. v. Harrison*, a different statute (the statute of

1907-08) was under consideration, a statute which in its purpose and in its provisions was altogether different from the statute now involved. In neither of the other decisions does it appear what statute was involved, nor what question was decided. They merely follow *Choctaw Ry. Co. v. Harrison* and *Ind. Ter. I. Oil Co. v. Oklahoma* in very brief memoranda opinions, without disclosing what statute was involved or what question was decided. The reasonable presumption upon their face would be that the same statute and same questions were involved in each case that were decided in *Choctaw Ry. Co. v. Harrison* and *Ind. Ter. I. Oil Co. v. Oklahoma*. They are as follows:

Large Oil Co. v. Howard, Auditor, 248 U. S. 549, 39 Sup. Ct. 183, 63 L. Ed. 416, memoranda opinion in full as follows:

"Per Curiam. Judgment reversed with costs, and cause remanded for further proceedings, upon the authority of *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 60 L. Ed. 779, 36 Sup. Ct. Rep. 453. And see *Howard v. Gipsy Oil Co.*, 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426."

And *Howard, Auditor, v. Gipsy Oil Co.*, 247 U. S. 503, 38 Sup. Ct. 426, 62 L. Ed. 1239, and companion cases, memorandum opinion in full as follows:

"Per Curiam. Judgments affirmed with costs upon the authority of *Choctaw & Gulf R. Co. v. Harrison*, 235 U. S. 292; *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522."

Upon the face of those opinions this court cannot say what was decided. It can say that the statute of 1916 is not referred to, and that the question of a state's power to tax a lessee's private personal share of mine products is not mentioned. Those decisions, whatever may have been the questions involved, are, as a matter of course, final as to those particular cases; but we do not feel that they constitute precedents which bind this court in its decision of questions not mentioned in those opinions nor decided adversely in the cases which they follow. The statute under consideration here was not involved in *Choctaw Ry. Co. v. Harrison*, nor in *Ind. Ter. I. Oil Co. v. Oklahoma*. The question involved here was not involved nor mentioned in *Ind. Ter. I. Oil Co. v. Oklahoma*, and the only reference made to it is in *Choctaw Ry. Co. v. Harrison* was that "an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth—
* * * was permissible according to many opinions of this court." Hence, the above statement being the only reference made in any of the above cases to the precise question involved in the case at bar, we feel that we are supported by rather than that we are precluded by them. A further review of those cases may serve to enlighten.

Choctaw Ry. Co. v. Harrison was the first of the cases from this state involving the power to tax minerals obtained under leases upon restricted lands. The statute under consideration in that case was section 6, art. 2, c. 71, Session Laws 1907-08, which provided for a tax upon the gross revenue of oil and mineral produced but provided in express terms that such tax should be in "addition" to the general ad

valorem taxes levied and collected upon the same property. Such a tax was obviously illegal and the statute void on its face, for the reason that it was a double tax and discriminatory, and amounted to a plain denial of equal protection under the law. It was contended by the Choctaw Railway Company that the tax was an occupation tax, and that the state had no power to levy such a tax. The court in passing upon the question did not say positively that it was an occupation tax, but did say that "it was a method commonly pursued in respect to license and occupation taxes," citing *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. 105, which, however, involved a Florida statute wherein the express purpose and intention was to levy an occupation tax intended as a factor in the regulation of the Pullman Company's business. The court said also, in reference to our statute, "that it had the effect of an occupation tax," citing *Ohio Tax Cases*, 232 U. S. 576, 579, 34 Sup. Ct. 372, 58 L. Ed. 737, which involved an Ohio statute wherein the sole object and purpose of the tax was declared to be a license for the privilege of doing business in the state. The title of the Florida statute (Laws 1913, c. 6421) was:

"An act imposing licenses and other taxes, providing for the payment thereof, and prescribing penalties for doing business without a license. * * *

The Ohio statute (Act June 2, 1911 [102 Ohio Laws, p. 247]) contained this provision:

"* * * The Auditor of State shall charge for collection from each railroad company a sum in the nature of an excise tax, for the privilege of carrying on its intrastate business. * * *

The Oklahoma statute 1907-08 contained no such provision nor imposed any such conditions, and hence was not similar to either the Florida or Ohio statute. It levied a property tax strictly, which was clearly intended as such, but being a double tax, being in addition to the general tax, it was discriminatory, and therefore a denial of equal protection under the law, and was palpably invalid, and the court properly so held it to be.

The next case in the line of cases from this state and relied upon as binding upon this court was *Ind. Ter. I. Oil Co. v. Oklahoma*, 240 U. S. 522, 36 Sup. Ct. 453, 60 L. Ed. 779. In that case the determinative question was whether the value of an oil lease upon restricted Osage Indian lands could be included as an element or item of taxable value and be taxed, as such, in assessing and taxing the property of the Ind. Ter. I. Oil Co., and the court, following its decision in *Choctaw Ry. Co. v. Harrison*, holding a coal lease to be a federal agency, held an oil lease in the latter case to be a federal agency, and, assuming the same statute to be involved in both cases, and that as the gross revenue tax in the first case had been held to be an occupation tax, held, in the latter case, that an oil lease, as such, could not be made subject to such a tax.

The next case in line was *Large Oil Co. v. Howard*, 248 U. S. 549, 39 Sup. Ct. 183, 63 L. Ed. 416. The opinion in that case is quoted in full above.

Thereafter four other cases went up from this state, viz.: *Howard v. Gypsy Oil Co.*; *Howard v. Ind. Ter. Ill. Oil Co.*; *Howard v. Okla. Oil Co.*; and *Howard v. Barnsdall Oil Co.*, 247 U. S. 504, 38 Sup. Ct.

426, 62 L. Ed. 1239. These four cases were consolidated and decided in one per curiam. The per curiam is quoted in full above.

Now every reasonable presumption would be, and every logical inference be, that the same statute was under consideration and same questions determined in the foregoing memoranda opinions that were decided in *Choctaw Ry. Co. v. Harrison and Ind. Ter. Oil Co.*, and, as the statute under consideration now was not involved in *Choctaw Ry. Co. v. Harrison* nor in *Ind. Ter. Oil Co. v. Oklahoma*, nor the same questions raised here that were decided in either of said cases, except where it was said in *Choctaw Ry. Co. v. Harrison* that a property tax on "coal at the pit's mouth is permissible," we do not feel bound, in fact we are unable to see just how or in what way we should be bound, in our determination of the questions presented here, by such line of decisions, except by what was said in *Choctaw Ry. Co. v. Harrison*.

The statute under consideration here, and the statute considered in *Choctaw Ry. Co. v. Harrison*, are very materially different. The statute of 1907-08 levied a tax upon mine products and expressly provided that such tax should be in addition to the general ad valorem tax. The statute of 1916 expressly declares that the tax shall be "in full and in lieu of all and every other tax," and especially provides that it shall be no greater nor less than the general ad valorem tax, and affords plain, adequate means for correcting all errors so as to make the rate exactly conform to the general ad valorem rate upon other property.

[1] As was said of this same statute in *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445, "The Oklahoma gross production tax * * * was intended as a substitute for the ad valorem property tax." The income tax in the Shaffer case was sustained primarily upon the ground that the "gross production tax" was a substitute for the ad valorem "property tax."

The fact that this statute has never been mentioned by the Supreme Court of the United States, until it held, as above quoted in *Shaffer v. Carter* subsequently decided; the fact that the whole line of said decisions is based upon authority of *Choc-taw Ry. Co. v. Harrison*; and the fact that in *Choc-taw Ry. Co. v. Harrison* it is plainly said that the very kind of a tax which the statute of 1916 levies is permissible according to many opinions of that court—should be sufficient answer to the claim that this court is forestalled by said decisions from sustaining the validity of such statute and the legality of the tax therein levied.

But, as some doubt seems still to be entertained as to what decisions this court should be bound by, and what ones it may be justified in following, we will review a few of the many decisions of that court wherein precise question involved in the case at bar has been squarely and emphatically passed upon by that court.

And in ascending a point from which we may view the long line of interwoven decisions upon the question, we bear in mind that if this court is justified in following the trend of that plain beaten line, the Legislature of this state also had a right to rely

upon same and act upon the authority of same in determining its power to enact the statute under consideration.

Beginning with *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, and we deem it unnecessary to go beyond that case for the reason that all the decisions antedating that case have often been cited and quoted from and followed in subsequent decisions, we find first, that the Nevada statute providing for a "net proceeds tax" on minerals and ores obtained from government land under mining rights obtained from the government was upheld and the legality of the tax sustained. The Nevada statute was identical in principle and purpose with ours. In passing upon the right of the state to tax these minerals and the kind of property which such minerals constituted, the court said:

"The moment this ore becomes detached from the soil in which it is imbedded, it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine, and extracted the ore or other mineral product. It is then free from any lien, claim or title of the United States, and is rightfully subject to taxation by the state, as any other personal property is.

"The truth of this proposition is too obvious to need or admit of illustration or elaboration. * * *

"In regard to the taxing of this personal property, and the mode of collecting it by sale, as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States

has any interest in the tax, or in the sale of the property taxed."

In *Beck v. Meagher*, 104 U. S. 283, 26 L. Ed. 735, Mr. Chief Justice Waite said:

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent"—citing *Forbes v. Gracey*, 94 U. S. 767, 24 L. Ed. 313.

In *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, Mr. Chief Justice Fuller said:

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using * * * an instrumentality of interstate commerce; * * * but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, * * * it is not open to attack as inconsistent with the Constitution."

In *Ficklen v. Taxing District*, 145 U. S. 22, 12 Sup. Ct. 812, 36 L. Ed. 601, Mr. Chief Justice Fuller distinguished the case at hand from the case of *Philadelphia Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; but referring to a statement made in the latter case by Mr. Justice Bradley, who delivered the opinion Mr. Chief Justice Fuller said:

"It is well settled that a state has power to tax all property having a situs within its limits, whether employed in interstate commerce

or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35 L. Ed. 613) 3 Inters. Com. Rep. 595; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. Ed. 158).

"And it has been often laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the state of its situs. *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. (21 L. Ed. 787); *Thomson v. Union Pac. R. Co.*, 76 U. S. 9 Wall. 579 (19 L. Ed. 792); *Western U. Teleg. Co. v. Massachusetts*, 125 U. S. 530 (31 L. Ed. 790)."

In *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229, Mr. Justice Holmes said:

"We need say but a word in answer to the suggestion that the tax is an unconstitutional interference with interstate commerce. In form the tax is a tax on 'the property and business of such railroad corporation operated within the state,' computed upon certain percentages of gross income. The prima facie measure of the plaintiff's gross income is substantially that which was approved in *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 228, 35 L. Ed. 994, 995, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. See, also, *Western Union Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. Ed. 49, 16 Sup. Ct. Rep. 1054."

In *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, a Texas statute which levied a tax upon gross receipts of

interstate commerce was held invalid, but Mr. Justice Holmes, who delivered the opinion, said:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution"—citing *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 270 (39 L. Ed. 311).

In *McHenry v. Alford*, 108 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614, Mr. Justice Peckham, in discussing the tax under consideration, said:

"* * * When it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings."

In *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, in sustaining a Minnesota statute which is exactly similar to the statute under consideration here, Mr. Justice Day, who delivered the opinion, sustained the Minnesota statute upon the authority of former decisions, among which he cited and quoted from *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; *Ficklen v. Taxing District*, 145

U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601; *Wisconsin, M. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 12 Sup. Ct. 121, 163, 35 L. Ed. 994; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; *McHenry v. Alford*, 168 U. S. 651, 18 Sup. Ct. 242, 42 L. Ed. 614, quoting and relying upon the same language which we have above quoted.

In *Brown v. Spilman*, 155 U. S. 665, 15 Sup. Ct. 245, 39 L. Ed. 304, the court expressly held that the lessees' share of oil and gas after it had been taken from the ground by the lessee was then his personal property and subject to his control.

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, the same thing was held upon the authority of *Brown v. Spilman*, *supra*; the court citing, quoting, and relying upon the reasoning in *Brown v. Spilman*.

In *Manuel v. Wulff*, 152 U. S. 505, 506, 14 Sup. Ct. 651, 38 L. Ed. 532, Mr. Chief Justice Fuller held that mining claims upon government lands are property which might be sold, transferred, mortgaged, and inherited, without infringing the title of the United States, citing *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, *supra*; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, *supra*.

In *St. Louis Mining Co. v. Montana Mining Co.*, 171 U. S. 654, 19 Sup. Ct. 61, 43 L. Ed. 320, Mr. Chief Justice Fuller again held that a mining claim was the individual property of the owner of the claim, and that he might sell it, mortgage it, or part

with it as he saw fit, citing *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, *supra*; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532, *supra*.

In *Elder v. Wood*, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464, the "gross product tax" law of the state of Colorado was sustained and the tax held to be valid. In this case it was contended that the gross products tax upon the mining claims and products from the mines granted by the United States was invalid for the reason that the operation of such mines was a federal agency which the state had no right to tax. The opinion of the court was delivered by Mr. Justice Moody, holding that the property value of the claims and the products obtained from the mines were property belonging to the operator of the mines; the court saying:

"Such an interest from early times has been held to be property, distinct from the land itself, vendable, inheritable, and taxable"—citing *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313; *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532; *St. Louis Mining & Milling Co. v. Montana Mine Co.*, 171 U. S. 650, 19 Sup. Ct. 61, 43 L. Ed. 320.

In *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365-374, 2 Sup. Ct. 257, 264 (27 L. Ed. 419), the court said:

"A state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A state may tax the stages in which the mail is transported, but this does not

regulate the conveyance of the mail any more than taxing a ship regulates commerce, and yet, in both instances, the tax on the property in some degree affects its use."

Upon the authority of *Gibbons v. Ogden*, 9 Wheat, 1, 6 L. Ed. 23, *Passenger Cases*, 7 How. 283, 12 L. Ed. 702, and *Morgan v. Parham*, 16 Wall. 471, 21 L. Ed. 303, the court based the conclusion above quoted.

In *Western Union Tel. Co. v. Attorney General of Mass.*, 125 U. S. 530-550, 7 Sup. Ct. 961, 964 (31 L. Ed. 794), in an opinion by Mr. Justice Miller, the court said:

"It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise. * * * A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are em-

ployed in the national service. So are steamboats, horses, stage coaches, foundries, shipyards and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the states it is manifest the state governments would be paralyzed. While it is of the utmost importance that all powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited."

In *Central Pac. Ry. Co. v. California*, 162 U. S. 91, 16 Sup. Ct. 766, 40 L. Ed. 903, Mr. Chief Justice Fuller, quoting from *Union Pac. R. Co. v. Peniston*, 85 U. S. (18 Wall.) 5, 21 L. Ed. 787, said:

"It cannot be that a state tax [meaning a property tax] which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the states all power to tax persons or property."

In this case the court also cites and quotes with approval from *Thomson v. Union Pac. Ry. Co.*, 76 U. S. (9 Wall.) 579, 19 L. Ed. 792.

In *Utah & Northern Ry. Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246, 29 L. Ed. 542; *Maricopa & Phoenix Ry. Co. v. Ariz. Ter.*, 156 U. S. 347, 15 Sup. Ct. 391, 39 L. Ed. 447; *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740; *Wagoner v.*

Evans, 170 U. S. 588, 18 Sup. Ct. 730, 42 L. Ed. 1154—the court expressly and squarely held that a state or territory had power to levy a property tax upon private property used under federal authority upon Indian reservations.

In *Thomas v. Gay*, 169 U. S. 264, 18 Sup. Ct. 340, 42 L. Ed. 740, *supra*, the identical questions were presented and decided that are involved in the case at bar, and every question involved in the case at bar was decided in *Thomas v. Gay*. In that case the Department of the Interior had leased to cattle men the grazing lands of the Osage Indian Reservation, and great herds of cattle amounting to tens of thousands were grazed upon the said lands. These reservations being attached to Oklahoma Territory for judicial purposes, the territory sought to tax the cattle.

The cattlemen contended that such a tax was a violation of the rights of the Indians, and an invasion of the jurisdiction and control of the United States over that and other lands. In answer to this the court said:

“As to that portion of the argument that *
* * the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & N. Ry. Co. v. Fisher*, 116 U. S. 28, and *Maricopa & P. R. R. Co. v. Arizona*, 156 U. S. 347.”

It was also contended that to force the cattlemen to pay this tax would affect the price which they could pay for the lease right to graze. In answer to this contention the court said:

"But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *N. Y., Lake Erie & W. Ry. Co. v. Pennsylvania*, 158 U. S. 431. There the state of Pennsylvania had imposed a tax upon a railroad * * * engaged in carrying on interstate commerce, and this tax was measured by reference to the amount of the tolls received. * * * It was claimed that the imposition of a tax on tolls might lead to increasing them * * * and * * * become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden upon interstate commerce."

The court further cites *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. 532, 41 L. Ed. 953, where the same contention was made, and wherein the court said:

"That the fact that the tax in question was to some extent affected by the amount of tolls received, and therefore might be supposed to increase the rate of tolls, and thus be a burden upon interstate commerce, was too remote and incidental to make it a tax upon the business transacted."

And after citing *Adams Express Co. v. Ohio State Auditor*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, the court said further:

"The suggestion that such a tax on the cattle constitutes a tax on the lands * * * is purely fanciful."

In further answering the contention that such a tax was an invasion of the right of Congress to deal with the Indians, the court said:

"The unlimited power of Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference with congressional power. It was decided in *Utah & Northern Railway Co. v. Fisher*, 116 U. S. 28 (29 L. Ed. 542), that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & P. Railroad Co. v. Arizona Territory*, 156 U. S. 347 (39 L. Ed. 447).

"The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

"These views sufficiently dispose of the objections urged against the power of the legislative assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians."

Also, in *Wagoner v. Evans*, 170 U. S. 588, 18 Sup. Ct. 730, 42 L. Ed. 1154, the same questions were raised and the same decision rendered, upon authority of *Thomas v. Gay*, *supra*.

In *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 26 Sup. Ct. 197, 50 L. Ed. 398,

the exact questions were presented that were presented in *Thomas v. Gay* and *Wagoner v. Evans*, *supra*, namely, the right to tax cattle grazed upon an Indian reservation under federal permission. Mr. Justice Peckham, who delivered the opinion, said:

"This court has heretofore determined that the Indians' interest in this kind of property, situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from taxation."

—citing *Thomas v. Gay* and *Wagoner v. Evans*, *supra*, and repeating the following:

"This court held that the tax put upon the cattle of the lessees was too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."

In *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801, the United States had let a contract for dredging the harbor of San Juan, Porto Rico, a reservation of the United States being dredged for the benefit of the United States. The insular government sought to levy a property tax upon the boats, tugs, and machinery used in dredging the harbor. The company sought to enjoin the collection of the tax upon the ground that such a tax was a burden upon and interference with the operation of a federal agency. The company contended also that the property had no taxable situs in Porto Rico. In answering these questions, the court, through Mr. Justice McKenna said:

"If Porto Rico had jurisdiction over the harbor area it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and being so situated, the valid-

ity of the tax upon it cannot be determined by an inquiry of the extent it may be benefited."—citing *Thomas v. Gay* and *Wagoner v. Evans*, *supra*.

The tax was sustained and the decree of the District Court enjoining the collection of such tax was reversed with directions to sustain the demurrer and dismiss the bill.

And in *Choctaw Ry. Co. v. Harrison*, *supra*, the court reiterated and still adhered to the same doctrine, namely, that a tax upon "* * * the coal at the pit's mouth was admissible according to many opinions of the court"—citing *Thomson v. Union P. R. Co.*, *supra*; *Union P. R. Co. v. Peniston*, *supra*; *Central P. R. Co. v. Cal.*, *supra*; *Thomas v. Gay*, *supra*.

Also, in *Kansas Natural Gas Co. v. Haskell* (C. C.) 172 Fed. 545, on the question as to whether the lessees' share of the oil and gas after it had been extracted from the earth and separated from the royalties was then the private personal property of the companies and subject to its exclusive control, the federal court said:

"On the contrary, it must be held he who by lawful right reduces to his possession mineral gas, or oil has the same absolute right of property therein, with the same power of barter, sale, or other disposition, including, of necessity, the right of transportation and delivery under such reasonable rules and safeguards as the exigencies of the case may demand and the state employ, as the farmer has of his corn, his wheat, or his stock, or the merchant of his wares, and such absolute right therein as the state cannot deny him. * * *"

Upon appeal by the state to the Supreme Court of the United States (*Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 218, 32 Sup. Ct. 442, 56 L. Ed. 738), the court, through Mr. Justice Day, approved the above language of the United States District Court, by affirming the decree. The sole theory upon which the above conclusion is based and in which its soundness must rest is that when oil, gas, and ores are extracted from the earth, and separated from the royalties due the Indians, they then become so absolutely and exclusively the private property of the lessee that the state has no more power to prevent their sale and shipment than it has to prevent the sale and shipment of the farmer's corn, his wheat and his stock, or the sale and shipment of the merchant's wares, and the very truth of the proposition refutes every argument against their bearing the same rate of taxes that the farmer's products and the merchant's wares must bear.

Also, in *Shaffer v. Carter*, 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445, decided March 1, 1920, the court said:

"The Oklahoma gross production tax, imposed on oil and gas producing companies, was intended as a substitute for the ad valorem property tax, and payment of it does not relieve the producer from taxation under the State Income Tax Law."

Hence, the Supreme Court has expressly said what kind of a tax the Oklahoma gross production tax is.

In view of the foregoing authorities, there should remain no doubt as to the proper conclusion in the case at bar.

The principle that a state has the right to raise the necessary revenue for state government by a reasonable rate of tax upon private property having a situs within its jurisdiction (as was said in *Gromer v. Dredging Co.*, *supra*) "no matter how engaged," has never been denied by the Supreme Court of the United States except as to property expressly exempt by law, but has been universally recognized by that court, not as a matter of grace merely, nor as an appropriate recognition of local rights or conveniences, but as one of the underlying principles essential to the maintenance of our dual form of government. In other words, the right of a state to maintain a state government is as essential to the existence of our scheme of government as is the exercise of any other agency of government; state government being an essential wheel in the machinery of our dual government to destroy which, by denying the right to raise revenue, would destroy the duality, thereby causing the whole framework to fail.

Other forces may constitute needed and appropriate agencies of the government, but the states and state governments are component elements of our government itself, our dual system of government; both elements must function or the dual scheme must fail. And, announced more than a century ago by the illustrious jurist Mr. Chief Justice MARSHALL, in his masterly opinion in *McCulloch v. Maryland*, 4 Wheat. 316-431 (4 L. Ed. 579) "the doctrine that a state may raise revenue by a tax on private property, though belonging to an agent of the government," has been so often repeated, reiterated, cited, and cross-cited, and

followed in subsequent opinions, as will be seen from the authorities above cited, that it has become a plain, beaten line in our jurisprudence, and having been followed for more than a century by the Supreme Court of the United States, we cannot feel justified in taking an opposite course. True it was said by the same eminent jurist that "the power to tax meant the power to destroy." These words have been very frequently used with but faint comprehension of their import or appropriate application, and with no realization whatever of the far graver dangers in the converse of the proposition.

Those words, if true at all, in their fullest sense are true in theory only, so far as they relate to a "property tax"; there being other equalizing and regulatory principles in the philosophy of our government, such as "equal protection under the law," "due process of law," and other limiting forces against excessive taxes, double taxes, confiscatory taxes, etc., which effectually curb the excessive exercise of such power and prevent its harmful effects. As to an "occupation tax" by a state upon the right to exercise a federal agency, such a proposition is preposterous. No such power has ever been recognized, and only upon an absurd conception of the distinct functions of our dual system has it ever been attempted.

There is a wide distinction between the taxation of the agency itself and the taxation of the private property of the agent. *Thomson v. Union P. Ry. Co.*, 76 U. S. (9 Wall.) 579, 19 L. Ed. 792 *supra*.

There is a wider distinction between the mere taxing of an agency by a "property tax" and the

control of such agency by a "license tax" or an "occupation tax," the payment of which being made a condition upon the right to operate the agency.

A state has no right whatever to control, restrict, or impair the free operation of a federal agency. The exercise of such power would mean the destruction of both. Being harmful to the one would necessarily be harmful to the other and to both.

The recognition of a few elementary principles would serve to solve and adjust such difficulties, viz.:

A state has no power to regulate or restrict the exercise of a federal agency.

A state has no power to impose an occupation tax or license tax upon the operation of a federal agency.

A state has power to raise revenue by a property tax upon all private property having a situs in the state, which the state is obligated to protect.

A state has power to impose a property tax upon the private property of a federal agent.

A state may have power, though it is questionable, to impose a property tax upon the value, commercially speaking, of a federal agency, a lease right, mine right, or other contract rights obtained from the federal government, if the taxable situs of such right were certain; but the actual situs of the value of a right obtained from the federal government is too uncertain, too indeterminate, for the value of such right, commercially speaking, to

be considered as an element of value in making up the assessment rolls. And, besides, if its taxable situs were certain, even then the revenue derived therefrom would be of too slight a benefit to the state to justify the effect it would have upon the operation of the right itself, and also the harmful effects upon the state government when viewed in the light of our dual scheme of government.

However, the power of a state to tax the value of a government mining claim, or lease right, as such, was upheld in *Forbes v. Gracey*, and other authorities cited above. But such power was denied to this state in *Ind. Ter. Ill. Oil Co. v. Oklahoma*, *supra*, which, under the principles above stated, we believe to be the correct rule. And since then this state has not sought to include the value of the lease, as such, in making up the assessment rolls, and does not include such elements of value in the statute under consideration. But, while this is true as to the lack of power of a state to tax the value of the lease right, as such, yet the state has power to tax the private property of a federal agent having an actual situs, and the exercise of such power does not rest upon the ground that the effect which such a tax might have upon the exercise of an agency "is too slight, too remote, too indirect, too fanciful," but upon the elementary principle that private property having a situs within the state and receiving protection from the state, should bear its proportion of the expense of protection.

The contention made in this case, and which has been made in every kindred case, that the pay-

ment of the tax will materially affect the price the lessee will be able to pay to the "poor Indian" for the lease, or affect the percentage of royalties which go to the Indian, is bare of merit. There is not one lessee but who would eagerly pay the tax many times over, if refusal to do so meant the forfeiture of his right to the lease. Such contention, in the light of facts well known, bears no semblance of sincerity.

There are still other reasons for sustaining the statute under consideration.

In the case of *United States Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. 211, 56 L. Ed. 459, *supra*, every principle of law was decided that is presented in the case at bar. The statute under consideration, there, which levied what it denominated a "gross receipts tax," was identical in every essential feature with the statute under consideration here. The question was first before the Supreme Court of Minnesota, 114 Minn. 346, 131 N. W. 489, 37 L. R. A. (N. S.) 1127, wherein the court held:

"The state has a right to impose a tax upon property within its borders regardless of the fact that such property may be employed by its owners in interstate commerce.

"The gross earnings tax provided by R. L. 1905, §§ 1013-1019, is not a tax upon the earnings of express companies, or upon the companies, or their right to engage in business, but is a tax upon their property within the state.

"A tax upon the property within the state of an express company engaged in interstate commerce, based upon its gross earnings with-

in the state on interstate shipments, is not a regulation of or interference with interstate commerce."

There being an appeal from the above decision of the Supreme Court of Minnesota to the Supreme Court of the United States, upon review of the judgment of the Minnesota court, the Supreme Court of the United States said:

"We find no error in the judgment of the Supreme Court of the state of Minnesota, and it is affirmed."

An analysis and comparison of the provisions of the Minnesota statute with the provisions of the Oklahoma statute will serve to accentuate the identity of principles involved.

In the Minnesota statute the tax is denominated "a gross receipt tax." The Oklahoma statute denominates it "a gross production tax." The Minnesota statute requires that express companies make reports to the State Auditor showing: The name of the company, the nature of the company, the location of its principal office, the names and addresses of its managing agents in the state, the entire receipts, including all sums and charges whether actually received or not from business done in the state, the amount paid by such express company to railroads within the state for carrying its freight within the state, the entire receipts of the company for business done within the state, after deducting the amount paid to railroads for carrying its freight. The Oklahoma statute requires each party engaged in mining within the state to make certain reports showing: The location

of the well or mine, the kind of mineral produced, the gross amount thereof, the actual cash value thereof at the place of production, the amount of royalty payable thereon, and whether such royalty is exempt by any law, state or federal, the facts on which said exemption is claimed.

The Minnesota statute provides that in case of failure or refusal of any express company to make the reports required by law, "the State Auditor shall inform himself as best he may," and may require the officers of said company to be brought before him with their books and records for his inspection, in order that he may inform himself fully as to the true amount of "gross receipts"; and provides, further, that the failure or refusal to attend and bring the books and records shall constitute a gross misdemeanor punishable by fine and imprisonment. The Oklahoma statute provides that in case of failure or refusal of any mining company to make the reports required by law, the State Auditor shall have the power to require such company to furnish such additional information as he may deem necessary, and may require the attendance of witnesses and the furnishing of books and records for his inspection, in order that he may fully inform himself as to the amount and true value of the "gross products"; and provides, further that a failure or refusal to attend, before him and produce the books and records of the company shall be certified to the district court, wherein the offender shall be dealt with as in contempt cases.

The Minnesota statute provides that the State Auditor, having ascertained the true amount there-

of, shall assess a tax of 6 per cent upon the "gross receipts." The Oklahoma statute provides that the State Auditor, having ascertained the true value thereof, shall collect a tax of 3 per cent on the "gross products."

The Minnesota statute levies the tax upon the "gross receipts" from business done between points within the state. The Oklahoma statute levies the tax upon the "gross products" obtained from mines operated within the state.

The Minnesota statute levies the tax "in lieu of all taxes upon its property"—express company's property. The Oklahoma statute levies the tax "in full and in lieu of all taxes upon its property"—mining company's property. The Minnesota statute provides that the taxes, when collected, should be credited to the general revenue fund. The Oklahoma statute provides that when the gross production tax is collected, it should be credited to certain funds.

The Minnesota statute provides a penalty for non-payment of such taxes, within 60 days after demand, of 10 per cent thereof at the time and—per cent a month for each subsequent month until the tax is paid. The Oklahoma statute provides for a penalty for non-payment of such taxes when due of 18 per cent per annum.

The Minnesota statute provides that the State Treasurer is authorized to distrain enough of the personal property of said defaulting express company to satisfy the taxes and penalty, and to sell such property for the taxes if the tax is not paid before the day of sale. The Oklahoma statute pro-

vides that the State Auditor is required to direct that a sufficient amount of the property of the mining company be sold upon execution to satisfy the taxes and penalties due.

The purpose of both statutes is the same, and the same result is obtained in each. There is not a thing required to be done, not a step required to be taken, under the Oklahoma statute, that was not required under the Minnesota statute. There is not a legal principle involved in any step required to be taken under the Oklahoma statute that was not involved in a similar step required under the Minnesota statute, except that the Oklahoma statute is by far the less rigid of the two.

In *Forbes v. Gracey*, *supra*, the Supreme Court of the United States had under consideration the statute of Nevada known as the "net proceeds tax." In every essential principle as to the purpose of the taxes, the species of property upon which it was levied, the species of tax levied upon it, the steps required to be taken in order to ascertain the amount and value of the property, the steps taken in the collection of the taxes, and the steps taken for enforcement of penalties for non-payment of taxes, were exactly the same as under the Minnesota statute and under the Oklahoma statute. The same contentions were made in order to escape payment of the Nevada tax that were made in order to escape the payment of the Minnesota tax, and are here made in order to escape the Oklahoma tax. The Supreme Court of the United States, in disposing of such contentions, among other things, said:

"In regard to the taxing of this personal property, and the mode of collecting it by sale, as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax, or in the sale of the property taxed."

And, as a final disposition of the questions presented and contentions made, the court said:

"In view of its importance we should postpone the decision until next term, if the questions presented were either doubtful or difficult of solution. We think a very few words, all we can give to the subject at this late day, will show that it is neither."

Forbes v. Gracey, supra.

There were two reasons which prompted the court in deciding the case at that time:

(1) Because of its importance to the mining interests of the Pacific states.

(2) Because the court did not consider the questions presented either doubtful or difficult of solution; hence the decision was rendered in order that it might constitute a precedent to be followed by all the Pacific states.

Upon the foregoing authorities we hold that the statute under consideration is valid, and that the tax therein levied is purely a property tax, and that the protestant's rights and the rights of all others similarly situated are adequately protected, even more so than was true under the Minnesota statutes in *U. S. Express Co. v. Minnesota, supra*, against the discrimination as to higher rates ac-

ording to value, than other property within the state is taxed, and that the lessee's private personal share of the mine products after same are taken from the ground, separated from the royalty due the Indians and reduced to lessee's private possession and absolute control, as said in *Haskell v. Kansas Nat. Gas Co.*, *supra*, "the same as a farmer has of his corn, his wheat or his stock, or the merchant of his wares," it is then subject to the same rate of property tax that the farmer's corn, his wheat and his stock, and the merchant's wares, are made to bear.

Also, that the plants, mills, smelters, and machinery, as said in *Gromer v. Dredging Co.*, *supra*, "no matter how engaged," are subject to the same rate of property tax which other property bears.

As to the question whether the value of protestant's lease, as such, is considered as an element in the assessment, or the question as to whether the commercial value of the lease itself, as such, could be taxed at all is not specifically raised in the instant case; but inasmuch as the statute has been assailed on that ground in other cases, and inasmuch as the question may be considered indirectly involved in the case at bar, we deem it proper to point out and hold that such element of value is not intended by the statute to be included, nor has the State Auditor included same, in estimating the taxable value of protestant's property, nor of any other property occupying a like status.

The lease, as such, that is, the commercial value of all leases upon restricted Indian lands, is considered as exempt by law under the authority of *Ind.*

Ter. Ill. Oil Co. v. Oklahoma, *supra*, and is therefore not included.

The provision of the statutes for including the value of leases in making up the assessment rolls applies only to leases upon unrestricted lands not under the supervision of the government, and is not intended to apply, and does not apply, to leases upon restricted lands under governmental supervision.

The order of the State Board of Equalization overruling the protest is affirmed.

KANE and MILLER, JJ., dissent. All other Justices concur.

In case decided June 1, 1921, the authorities cited in the above opinion are re-affirmed by this court, in opinion by Mr. Justice Brandies. I refer to *Choctaw Ok. Gulf R. Co. v. Mackey*, U. S. Adv. Ops. July 1, 1921, wherein an ad valorem property tax on property used by Federal Government along with others is held valid.

The original opinion in the instant case written by former Chief Justice Kane and copied in plaintiff in error's brief was written upon the theory, as stated therein, that the Supreme Court of this state was bound by the former decisions of this court and not because the decisions were a correct application of the 1916 Act, using this language:

"This court clearly stated the principles exempting the subject matter involved from the operation of the state law, but following the contention of the Attorney General upholding the law on the theory that the act imposed a property tax, and in this respect the case was distinguishable from *Choctaw, Oklahoma &*

Gulf R. Co. v. Harrison, supra, wherein the Supreme Court held that the Act of the Legislature of 1908 was invalid because it attempted to impose an occupation of privilege tax upon a Federal agency. The Supreme Court of the United States, without noticing this distinction, reversed the case in a memorandum opinion upon the authority of *Choctaw & Gulf Ry. Co. v. Harrison, supra*, and other cases hereinbefore cited.

"As we believe those cases are controlling on the question now under consideration, it follows that the judgment of the court below must be affirmed."

As hereinbefore stated, this court in the case of *Shaffer v. Carter, supra*, likewise sustained the contention of the Attorney General that the 1916 Gross Production Tax was a property tax; to use the language of the court, "a substitute for the ad valorem property tax." If Δ is a substitute for the ad valorem property tax, it must play its part subject to the same rules, limitations and applications to which the property tax is subject.

It must be noted that the Oklahoma Act exempts from the operation of the tax all leases and property of every kind which is exempted by the laws of the United States and must, therefore, be construed not to apply as a tax on the lease of the restricted Indian, but the lease referred to therein as being included in the gross production valuation in lieu of property tax thereon is an unrestricted or admittedly taxable lease, if such there be. In other words, by the plain terms of the 1916 Act nothing is to be regarded in the valuation of production coming from the restricted land, except the indi-

vidual share of the lessee in the production itself after same has been reduced to his possession. The valuation is based upon the market price of the oil at the place of production, being followed by the provision that the rate shall be raised or lowered to meet the rate of other ad valorem or property tax upon the same valuation of property and the conclusion is inevitable that the thing that is taxed is the personal property of the lessee. As stated in the above quoted opinion in the Skelton case, *supra*, it is not to be presumed that the Legislature of the State of Oklahoma intended the tax to apply to a restricted lease which is admittedly not taxable. Such leases are not to be taken into account in arriving at the valuation and, therefore, are not burdened by the tax.

Conclusion.

In the opinion of defendant in error whether the tax in question be treated as one upon *income* and not as a property tax, or whether it be regarded as a tax upon the source of income—the oil at the curb of the well—it is valid and must be sustained under the foregoing authorities.

Respectfully submitted,

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DEC 8 1921

WM. R. STANSBURY

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1921.

—
No. 322.
—

F. A. GILLESPIE,
Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA,
Defendant in Error.

—
F. A. GILLESPIE,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

—
**REPLY BRIEF FOR PLAINTIFF IN ERROR
AND PETITIONER.**
—

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Attorney for Plaintiff in Error and Petitioner.

SUBJECT INDEX

	Page
Preliminary Statement	1-3
Brief of Attorney General	31
Brief of Chief Justice Harrison,—Large Oil Company Case	33
Opinion Chief Justice Harrison,—Skelton Case ..	31
Opinion of Chief Justice Harrison,—This Case ..	38
Section 1, Act of 1916	34
Points and Authorities (Showing Propositions and Authorities Supporting Same)	4-46
(I) The State of Oklahoma has utterly failed to meet the proposition, and the authorities sus- taining the same, that a tax by the State on in- come derived from leases of the character now involved, is a direct tax upon a power, and an agency or instrumentality itself, of the Federal Government, which the State has absolutely no power to tax by a direct or indirect tax, as well as being a tax on the income, when the source it- self is not taxable	4-24
(II) Where the question is whether a State tax- ing law contravenes rights secured by the Con- stitution of the United States, that question is determined by the practical operation and ef- fect of the tax, and not upon the form of the Act, nor how it is construed or characterized by the State Court, nor upon the definitions of the text- books, economists and tax theorists, and all these invoked by the State have no legitimate bearing on the question involved in the case at bar	24-29
(III) The Gross Production Cases decided by this Court, and holding the Gross Production Sta- tutes of Oklahoma, as applied to leases of the character involved herein, unconstitutional, and their companion case Indian Territory Illumin- ating Oil Co. v. Oklahoma, 240 U. S. 522, holding any taxing statute of the State of Oklahoma, as applied to such leases, directly or indirectly, un- constitutional, apply to the Income Tax Statutes of Oklahoma, as applied to such leases, clearly making them likewise unconstitutional	29-36

- (IV) The opinion or decision of the Supreme Court of Oklahoma herein construes the income taxes involved, and attempts to sustain them, as a property tax, which is a tax on the leases themselves, and they cannot, therefore, be sustained 36-39
- (V) The income from the leases involved herein is not remote from the source as to subject it to taxation by the State of Oklahoma 40-43
- (VI) If this Court adopt the definitions, classifications and nature of the tax claimed by the State, and supported by the opinion or decision of the Supreme Court of Oklahoma, and permit the operation and effect resulting, then the income from every Federal instrumentality or agency will be taxable by the State 43-45

ALPHABETICAL LIST OF CASES CITED

American Manufacturing Co. v. St. Louis, 250 U. S. 230	25
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 ..	26
Henderson v. Wickham, 2 Otto 179	15, 28
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522	30
<i>In Re</i> Protest of Skelton Lead & Zinc Co., 197 Pac. Rep. 495	37
Ludwig v. Telegraph Co., 216 U. S. 146	27
McCulloch v. Maryland, 4 Wheat. 316	23
Mugler v. Kansas City, 125 U. S. 625	28
Mountain Timber Co. v. Washington, 245 Wash. 219	26
Pollock v. Loan & Trust Co., 157 U. S. 429	5
Pollock v. Loan & Trust Co., 158 U. S. 601	9
Reid v. Railroad Co., 187 U. S. 137	27
Robbins v. Taxing District, 129 U. S. 489	28
Shaffer v. Carter, 252 U. S. 37	27
Stockard v. Morgan, 185 U. S. 27	28
Thomas v. Gay, 169 U. S. 264	40
United States v. Rickerts, 188 U. S. 452	16
Williams v. Talladega, 226 U. S. 404	42

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The learned Attorney General, through his able Assistant Attorney General, has filed both an able and

astute Brief, and we, therefore, feel it incumbent upon us to make reply to it.

Counsel for the State would seem to have made an effort to confine the **Pollock Case** merely to part of the decision, which held that, since, under the rule of apportionment, Congress could not tax the real estate or personal property, the original source, it could not tax the income derived therefrom, and have ignored the fact that this Court stated, with reference to the taxation of the income from state and municipal bonds, a still broader principle, and that is, that, in taxing such income, there was an **absolute want of power**, inasmuch as such a tax would be one directly upon the instrumentalities and agencies of the State.

Counsel have undertaken also to separate the income from the leases in question, so as to bring such income within the terms of the cases allowing income from interstate or from exports to be included in the income of persons having these as sources, among others, from which income is derived. In order to accomplish this result, an attempt has been made to invoke definitions and characterizations of the income tax, when considering the exercise of a plenary power of taxation by the State, of the taxing authority.

It would seem, therefore, that counsel are basing their contentions mainly upon the following propositions:

First. That the income from these restricted leases became so separated from the source, that the rule heretofore applied, that the tax upon the income from Federal instrumentalities and agencies is a direct assault upon the instrumentalities or agencies themselves, should not govern this case.

Second. That the State of Oklahoma has by its laws, or through its Courts, the right to define and characterize an income tax, so as to take it from the rule heretofore applied by this Court, that it is the operation and effect of the tax that will determine whether or not it falls within the constitutional prohibition, and not what a State Constitution, or statute, or the decisions of its Courts of last resort may claim or define the nature of a tax to be.

Third. That the Gross Production Tax Cases, heretofore decided by this Court, no longer are of any controlling force, for the reason that the Supreme Court of Oklahoma has recently held that the Gross Production Statutes of Oklahoma impose a property tax, as now existing, although in several cases held by this Court invalid as taxing agencies and instrumentalities of the Federal Government in identically the same kind of leases as now involved, by a presumption indulged in by the Supreme Court of Oklahoma that this Court did not have the same statutes in mind, as it handed down merely a memorandum opinion in each of the cases involving them, and by a plea by Counsel for the State that this Court now overrule these cases.

We feel justified in now saying that it stands admitted or conceded in this case that the oil and gas leases made by or on behalf of restricted Indians, under the authority of the Acts of Congress, are under the protection of the Federal Government, and that these leases and the lessees are instrumentalities and agencies of the Federal Government, and that the leases themselves can be taxed either directly or vicariously.

Let us now examine the main contentions of the State, and some of the typical authorities relied upon,

and we shall see that able Counsel for the State have failed to meet the propositions and authorities marshaled in our Original Brief.

I.

The State has utterly failed to meet the proposition, and the authorities sustaining the same, that a tax by the State upon income derived from leases of the character now involved, is a direct tax upon a power, and an agency or instrumentality itself, of the Federal Government, which the State has absolutely now power to tax by a direct or indirect tax, as well as being a tax on the income, when the source itself is not taxable.

We need go no further than the admission and statement of the learned Chief Justice of Oklahoma in the case of **In Re Skelton Lead & Zinc Company's Gross Production Tax** (Okla.), 197 Pac. Rep. 495, not yet officially reported, upon which his decision in the case at bar is predicated, in order to establish the character of the leases involved, and the position of the lessee, as an agency and instrumentality of the Federal Government. This opinion is exploited in the Brief for the State, and, upon its authority, this Court is asked to overrule its decisions in several cases involving the Gross Production Statutes of the State of Oklahoma.

In that case, the Chief Justice of Oklahoma said:

That the operation of this class of leases is a **Federal instrumentality** we readily concede. That question was decided in **Choctaw O. & G. Ry. Co. v. Harrison**, 235 U. S. 292, 35 Sup. Ct. 27, 59 L. Ed. **Ind. Ter. Oil Co. v. Oklahoma**, 240 U. S. 522, 36 Sup. Ct. 453m 60 L. Ed. 779. Likewise, the proposition that the State has no power to levy a tax upon

the privilege of operating a Federal Instrumentality is conceded.

Counsel seem to either forget or ignore the full extent of the decision of this Court in **Pollock v. Farmers Loan & Trust Co.**, 157 U. S. 429, and do not recognize that another principle, following a long line of decisions, was enunciated, as well as the doctrine that, where the source could not be taxed, the income derived therefrom was also exempt from taxation.

The Court was not unanimous on the proposition that the tax on income from real estate and personal property was a direct tax so as to fall within the rule of apportionment. The Court, however, was unanimous upon the proposition that the tax imposed by the Act of Congress upon the interest or income from the bonds of municipal corporations of the State was a tax on the powers and operations, and the agencies and instrumentalities of the State, and that the Act must fall as to these, as it was immaterial whether the tax was a direct or indirect tax, or subject, or not subject, to the rule of apportionment. In other words, there was an absolute lack of power in Congress to impose a tax upon such income, whether the tax be considered direct or indirect, and there was no difference in opinion of the Justices then composing this Court.

In view of the positions taken by Counsel for the State, it will probably not be amiss to again briefly review this landmark in the decisions of this Court, and so decisive of the case at bar.

Chief Justice Fuller, in leading up to the discussion of the questions involved, stated the first proposition presented, on page 555, as follows:

That the law in question, in imposing a tax on the income or rents of real estate, imposed a tax on the real estate itself; and imposing a tax on the interest or income of bonds or other personal property held for the purposes of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such a tax is a direct tax, and void because imposed without regard to the rule of apportionment; that by reason thereof the whole law is invalidated.

After having stated the contention that the law was invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity, he stated the third proposition as follows:

That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

It will be seen, therefore, that there were three propositions before the Court, the one challenging the law as imposing direct taxes, without regard to the rule of apportionment; the other, as imposing indirect taxes, without regard to the rule of uniformity, and the third, as imposing a tax, without any power whatsoever to tax by either a direct or indirect tax. In the two first instance, Congress had the power to tax, but was limited by the rule of apportionment in the first, and by the requirement of uniformity in the second, while, in the third instance, there was a constitutional prohibition against any taxation by Congress, and it was immaterial whether the tax should be determined to be direct or indirect.

Chief Justice Fuller, in the majority opinion, and all the Justices dissenting, unanimously agreeing with

the majority on this one proposition, places the refusal to allow Congress to tax income derived from state or municipal bonds, upon the broad proposition that such a tax was upon the powers and operations, and instrumentalities of the State.

On this question, the Chief Justice said:

Another question is directly presented by the record **as to the validity of the tax levied by the act upon income derived from municipal bonds.**

The Constitution contemplates **the independent exercise** by the nation and the state, severally, of **their constitutional powers.**

As the states cannot tax the powers, the operations or property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of the State.

After holding that a municipal corporation is one of the instrumentalities of a State Government, and referring to **United States v. Railroad Co.**, 17 Wall. 322, the Chief Justice said:

The revenues thus adjudged to be exempt from Federal taxation were not themselves **appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation**, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting

all the property and income of a state or municipal corporation, which is a political division of the State, from federal taxation, **equally require the exemption of all the property and income of the national government from state taxation.**

After citing cases, the Chief Justice continues:

The law under consideration provides: "That nothing herein contained shall apply to states, counties or municipalities." It is contended that although the **property or revenues of the states or their instrumentalities cannot be taxed**, nevertheless the income derived from state, county and municipal securities can be taxed. But we think the same want of power to tax the property or revenues from the state or their instrumentalities exist in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in **Weston v. Charleston**, 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate on the power to borrow before it is exercised, and have a sensible influence on the contract. To any extent, however inconsiderable, it is a burden on the operation of government. It may be carried to an extent which will arrest them entirely. * * * The tax on the government stock is thought to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities, it is obvious that **taxation on the interest therefrom** would operate on the power to borrow money before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

It is clearly apparent, therefore, that there is, and can be, no cleavage of the income from the Federal instrumentality producing the income, so as to make it, by any conceivable plan or method, taxable by a State. And the leases involved, from which the income is derived, are in no different position than were the securities which this Court under consideration in the **Pollock Case**. Applying, therefore, the language of this Court used in the preceding quotation, we can, on an unbroken line of its decisions, by very slightly paraphrasing the language, say of the leases now involved:

It is obvious that **taxation on the income therefrom** would operate on the power to make such leases, **before it is exercised**, and would have a **sensible influence on the contract**, and that the tax in question is **a tax on the powers of the United States and their instrumentalities**, and consequently repugnant to the Constitution.

Mr. Justice Field wrote a concurring opinion, agreeing with the majority on the propositions then decided, but strongly urging that the law ought also to be held invalid on the ground that it imposed indirect taxes in violation of the constitutional requirement of uniformity.

Justice Field said, beginning on page 601:

The law is also invalid in its provisions authorizing the taxation of bonds and securities of the States and of their municipal bodies. It is objected that the cases pending before us do not challenge any threatened attempt to tax the bonds or securities of the state, but only of the municipal bodies of the states. The law applies to both kinds of bonds and securities, those of the states

as well as those of municipal bodies of the states, and the law of Congress, we are examining, being of a public nature, affecting the whole community, having been brought before us and assailed as unconstitutional in some of its provisions, we are at liberty, and I think it is our duty to refer to, other unconstitutional features brought to our notice in examining the law, though the particular parts of their objection may not have been mentioned by counsel. These bonds and securities are as important to the performance of the duties of the State **as like bonds and securities of the United States are important to the performance of their duties**, and are as exempt from taxation of the United States **as the former are exempt from taxation of the States**. As stated by Judge Cooley in his work on the principles of Constitutional law: "The power to tax, whether by the United States or by the states, is to be construed in the light of, and limited by, the fact that the states and the Union are inseparable, and that the Constitution contemplates the **perpetual maintenance of each**, with all its constitutional powers, **unembarrassed and unimpaired by any action of the other**. The taxing power of the Federal Government does not, therefore, extend to the means or agencies through which the states perform their essential functions, since, if these were within its reach, they might be embarrassed, and perhaps **wholly paralyzed**, by the burdens it might impose. 'That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which it exerts the control,—are propositions not to be denied.' It is true that taxation **does not necessarily and universally destroy**,

and that to carry it to the **excess of destruction** would be an abuse not to be anticipated; but the **very power** would take from the states a portion of their intended liberty of **independent action** within the sphere of their powers, and would constitute to the State a **perpetual danger of embarrassment and possible annihilation**. The Constitution contemplates no such shackles.

The Internal Revenue Act of June 30, 1864, in Section 2, provided that railroad and certain other companies specified, indebted for money for which bonds had been issued, which interest was stipulated to be paid, **should be subject to a tax of five per cent on the amount of all such interest**, to be paid by the corporations and by them deducted from such bonds; and the question arose in **United States v. Baltimore & O. R. R. Co.**, 84 U. S., 17 Wall. 322, whether the tax imposed could be thus collected from the revenues of the cities owning such bonds. This Court answered the question as follows; "There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal Government upon the subjects and in the manner prescribed by the Act we are now considering, is undoubted. There are, however, certain departments **which are excepted from the general power**. The right of the states to administer their own affairs through their legislative, executive and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this Court, and by the practice of the Federal Government. If they may be taxed **lightly**, they may be taxed **heavily**; if **justly**, **oppressively**. Their operation may be impeded and may be destroyed, **if any interference is permitted**. Hence, the **beginning of such taxation is not allowed on the one side, is not claimed on the other.**"

The learned Justice concluded, beginning on page 607:

I am of opinion that the whole law of 1894 should be declared void and without any binding force—that part which relates to the tax on rents, profits or income from the real estate, that is, so much of it as constitutes part of the direct tax, because not imposed by the rule of apportionment, according to the representation of states, as prescribed by the Constitution—and that part which imposes a tax upon the bonds and securities of the several States, and upon the bonds and securities of the municipal bodies, and upon the salaries of Judges of the Courts of the United States, **as being beyond the power of Congress**; and that part which lays duties, imposts and excises, as void in not providing for the uniformity of the Constitution.

Mr. Justice White, afterwards Chief Justice, in his dissenting, which was concurred in by those dissenting, agreed fully with the majority opinion on this branch of the case, saying, beginning on page 652:

In regard to the right to include in an income tax **interest upon bonds of municipal corporations**, I think the decisions of this Court, holding that the Federal Government is **without power to tax** the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that **where there is no power to tax** for any purpose whatever, **no direct or indirect tax can be imposed**. The authorities cited in the opinion are decisive of this question. They are relative to **one case** and not to **the other**, because, in the one case, there is **full power to tax** in the Federal Government, the only controversy being whether the

tax imposed is **direct or indirect**; while in the other, **there is no power whatever** in the Federal Government, and, therefore, the levy, **whether direct or indirect, is beyond the taxing power.**

Mr. Justice Harlan, concurring with the dissent of Chief Justice White, but handing down a brief written opinion, on page 655, said:

While the property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common welfare of the United States, the instrumentalities employed by the states in execution of their powers are not subjects of taxation by the United States; and **any tax imposed directly upon interest derived from bonds issued by the municipal corporations** for public purposes, under the authority of the State **whose instrumentality it is**, is a burden upon the exercise of the powers of that corporation **which only the State creating it can impose.** In such a case, it is immaterial to inquire **whether the tax is, in its nature and by its operation, a direct or indirect tax; for the instrumentalities of the states,—among which,** it is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public—**are not subjects of national taxation, in any form or for any purpose,** while the property of private corporations and individuals is subject to taxation for national purposes. So it has been frequently adjudged, and the question is no longer open in this Court.

There is no escape, therefore, from the proposition that this Court has always unanimously held that an attempt to tax the income derived from securities, obli-

gations or contracts, which are the instrumentalities or agencies of the Federal Government by a State, is the same as a tax imposed directly upon the security, obligation or contract from which the income flows. This Court has never based its decisions denying such a right upon the question as to whether or not such a tax was a direct tax, levied in violation of the rule of apportionment, or an indirect tax imposed contrary to the requirement of uniformity, but upon the broader principle that there is **no right or power whatever in the State to impose a tax upon an instrumentality or agency of the Federal Government**, and that such a tax upon such income **is identically the same as a tax directly imposed upon the security, obligation or contract itself**. In other words, it is immaterial whether it be direct or indirect; it is the imposition of a tax in a sphere or zone into which the State cannot enter at all.

The unanimity which this Court reached upon the proposition now discussed is based upon the cases which we have cited in our Original Brief, and particularly under Points II, III and IV.

With the unanimous statement of the rule as to taxing income derived from instrumentalities or agencies of the States, as evidenced by the bonds and securities of the States, and the bonds and securities of the municipal corporations created by the States, and the same rule always being applied to similar taxation by the States on like instrumentalities and agencies of the Federal Government, there is, and can be, but one application made of the cases heretofore decided by this Court, denying the right to in any manner impose a tax affecting leases identical with, or similar to those involved in the case at bar. The result necessarily is that a tax upon the income derived from the leases is

a tax upon the power to make them, and consequently a tax upon the powers and operations of the Federal Government itself, which will not be permitted to be accomplished either directly or indirectly, or in any guise or form whatever.

In **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, involving Osage leases similar to those now under consideration, a tax much more indirect than the one now under review, was held to be the same as a tax upon the lease itself, and was therefore, a tax upon the power to make the lease, and consequently upon the powers and operations of the Federal Government. The opinion of this Court was unanimous, and it is one of the authorities, upon which we are mainly relying.

Stating the immunity of the leases from taxation by the State of Oklahoma, this Court said:

The Board of Equalization, the referee, and the Court in the first opinion, **regarded the leases as taxable entities**. In the second opinion it was held that they could not be so regarded under the Constitution of the State, but the Court gave them **effective representation in the capital stock of the company**, and the latter was taken **as evidence that the value of the property of the oil company was \$500,000.00**. Whether the Constitution of the State permits this accommodation, we are not called upon to say. **We are clear it cannot be permitted to relieve from the restraints upon the power of the State to tax property under the protection of the Federal Government. That the leases have the immunity of such protection we have decided.**

Citing, and stating the holding, and applying the case, of **Railroad Co. v. Harrison**, 235 U. S. 292, involv-

ing one of the Gross Production Statutes of Oklahoma, this Court said:

The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duties to the Indians.

The application of the case to that at bar needs no assisting comment. **A tax upon the lease is a tax upon the power to make them, and could be used to destroy the power to make them.** If they cannot be taxed as entities, they cannot be vicariously taxed by taxing the stock as an evidence rather than by directly estimating as the Board of Equalization and the referee did. The assessment by the board was of the leases as objects of taxation, **having no immunity under Federal law.** * * * It is manifest, therefore, when the court took the stock as evidence of the value of the property of the Company, the court took it **as evidence of the value of the leases,** and thereby justified their assessment and taxation. This, for the reasons we have stated, was error.

It follows from these views that the assessment against the oil company, **so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.**

The attempt, therefore, of counsel for the State to separate the income derived from these leases from the leases themselves is futile. As we have shown in our Original Brief, the only value the leases have is the income, and it necessarily follows that a tax upon the income is one upon the leases themselves.

In **United States v. Rickert**, 188 U. S. 432, 47 L. Ed. 532, there is well stated and illustrated the care with

which the Government handles Indian affairs, and the exemption of Indian property and rights, and the instrumentalities and agencies used and employed in their behalf from taxation by the States. The Court held, notwithstanding the definitions of the State Court, and State Constitution, that neither the lands, held in trust by the Federal Government for the Indians nor the improvements on the lands, nor the horses, cattle and other property while on the lands, and furnished by the Government, could be taxed by the State.

The Court said, beginning on page 437:

If, as is undoubtedly the case, these lands were held by the United States **in execution of its plans relating to the Indians**,—without any right in the Indians to make contracts in reference to them, or to do more than occupy and cultivate them,—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for State or municipal purposes, **to assess the lands in question** until at least the fee was conveyed to the Indians. These Indians are yet the wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the agreement of 1889, ratified by the Act of 1891, is part of **the national policy** by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privilege of citizenship. To tax these lands **is to tax an instrumentality employed by the United States for the benefit and control of this dependent race**, and to accomplish the benefi-

cent objects with reference to a race of which this Court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has promised, there arises the duty of protection, and with it the power." **United States v. Kagama**, 118 U. S. 375. So that if they be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated; for by the Act of 1887 the Government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, "and free of all charges or encumbrances whatsoever." To say that these lands may be assessed and taxed by the county of Roberts under the authority of the State is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from encumbrances.

It is true that the statutes of South Dakota, for the purpose of taxation, classify "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. But that classification cannot apply to permanent improvements upon the lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the Nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians **is necessary to effectuate the policy of the United States.**

Counsel for the appellee suggests that the only interest of the United States is to be able at the end of twenty-five years from the date of the allotment to convey the land free from any charge or

encumbrance; that if the house upon the Indian land were seized and sold for taxes, that would not prevent the United States from conveying the land free from any charge or encumbrance; and that, in such case, the Indians could not claim any breach of contract on the part of the United States. These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract, each party of which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the Government. The Government could not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. In **Choctaw Nation v. United States**, 119 U. S. 1, this Court said: "The recognized relation between the parties to this controversy, therefore, is that between the superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorized the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to the technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws." See also **Minnesota v. Hitchcock**, 183 U. S., 373.

Answering the question as to the taxation of horses, cattle and other personal property, the Court said:

The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and permanent improvements thereon. The personal property in question was purchased with the money of the Government, and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

The leases in question are as much instrumentalities furnished by the Federal Government as the property in the case just preceding, and there is just as much obligation to protect them from the taxing powers of the State in the case at bar as in that case.

While this Court held in the **Pollock Case**, that the income from municipal bonds, or, in other words, from the instrumentalities of the States, could not be taxed, on the broad ground that such a tax was one on the powers of the State, yet it also predicated it upon the principle that, where the source itself cannot be taxed, the income derived therefrom is equally exempt. In that case on the rehearing, 158 U. S. 601, this Court said:

We have **unanimously** held in this case that so far as this law operates **on receipts from municipal bonds**, it cannot be sustained, **because it is a tax**

on the power of the States, and their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and **taxable as such without reference to the source** from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor, and it follows that **if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax;** and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

The attempt, therefore, of Counsel for the State to separate the income of these leases from them, as a separate entity and taxable, must prove futile. All the arguments now urged upon this Court to accomplish such a result, were pressed upon it in the **Pollock Case**, and this Court unanimously refused to accede to the contention as to instrumentalities of the States, and the majority finally held could not be done even as to usual and ordinary personal property, not impressed with any of the attributes of a Federal instrumentality or agency.

Leading up to, and laying the foundation for the excerpt last quoted, this Court said:

The stress of the argument is thrown, however, on the assertion that an income tax **is not a property tax** at all; that it is **not a real estate tax, or a crop tax, or bond tax;** that it is an assessment upon the taxpayer on account of his money spend-

ing power as shown by his revenue for the year preceding the assessment; **that rents received, crops harvested, interest collected, have all lost connection with their origin, and although once not taxable, have become transmitted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it came.**

Noting that the same view was entertained and argued by Mr. Pitt in his speech introducing his income tax law in 1799, and that the dissenting Justice in *Weston v. Charleston*, 2 Pet. 449, proceeded upon the ground, the Court disposed of the contention as follows:

That was a state tax, it is true; but the States have power to lay income taxes, and if the source is not open to inquiry, constitutional safeguards might be easily eluded.

We have undisputably demonstrated that a tax upon the leases involved is a tax upon the powers and operations of the Federal Government; that, when considering the effect and operation of a tax within the purview of the constitutional prohibition against a State's taxing the powers and operation of that Government, the income sought to be taxed cannot be separated and torn from its non-taxable source, and transmuted in its new form into taxable subject-matter, and that, therefore, a tax upon the income is identically the same, with the same identical operation and effect as a tax directly imposed upon such non-taxable source itself.

We do not now and never have, claimed that other property, used by the Federal agent or instrumental-

ity, even though in connection with his contract with the Government, is not taxable, and herein lies the distinction between this and many of the cases relied upon by the State as bringing the income within the taxing powers of the State.

These cases and the principles announced bring this case squarely within the principles long ago announced by this Court in the case of **McCulloch v. Maryland**, 4 Wheat 316, where it is said:

The court has bestowed on this subject its most deliberate consideration. The result is the conviction that **the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.** This is, we think, the unavoidable consequence of that **supremacy** which the Constitution has declared.

We are **unanimously** of opinion that the law passed by the Legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion **does not deprive the States** of any resources which they originally possessed. It **does not extend** to a tax paid by the real property of the bank, in common with other real property in the State, nor to tax imposed on the interests which the citizens of Maryland hold in this institution, in common with other property of the same description. **But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution.** Such a tax must be unconstitutional.

We submit, therefore, that the labored effort of Counsel for the State, however plausible it may seem, to separate and strip the income from its non-taxable source is in vain, and cannot prevail against the authorities, which we have adduced.

II.

Where the question is whether a State taxing law contravenes rights secured by the Constitution of the United States, that question is determined by the practical operation and effect of the tax, and not upon the form of the Act, nor how it is construed or characterized by the State Court, nor upon the definitions of the textbooks, economists and tax theorists, and all these invoked by the State have no legitimate bearing on the question involved in the case at bar.

Counsel for the State have invoked certain definitions and characterizations of the tax involved, and the form and manner in which the Legislature of Oklahoma has sought to impose the tax, and seem to rely very much on the latest pronouncement of the Supreme Court of Oklahoma on the Gross Production Statutes of that State, heretofore called to the Court's attention, and gleefully use the case of **State v. Frear**, 148 Wis. 134, in which the Supreme Court of that State seems to undertake definitely to define and State the nature of an income tax against all future determination. These definitions and characterization may be well enough, where a Court is exercising plenary powers of taxation over a subject-matter with no constitutional limitations on the exercise of its power, but they have absolutely no relevancy to the question now to be determined.

We believe that we fully established this proposition in our main Brief, but, since Counsel seems so insistent to the contrary, we take the liberty of calling attention to some additional cases, which demonstrate the baseless ground of the contention.

In **Shaffer v. Carter**, 252 U. S. 37, is invoked, but contains nothing that militates against the position of the defendant in the case at bar. We have already distinguished this case in our Brief in chief page 191.

This case, however, does sweep away the effort to invoke the definitions given by the various courts and textbooks as to the nature and character of the tax.

In treating a contention that an income tax is in the nature of a personal tax, or a subjective tax imposing personal liability upon the recipient of the income, beginning on page 55, this Court said:

This argument, upon analysis, resolves itself into a mere question of definition, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a State law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed.

In **American Manufacturing Co. v. St. Louis**, 250 U. S., 459, after referring to the construction placed by the Court of highest resort being usually conclusive upon this Court, it is said, beginning on page 462:

But, as has been held very often, the question of whether a State law or tax imposed thereunder deprives a party of rights secured by the Federal Constitution, depends not upon the form of the

act, nor upon how it is construed or characterized by the State Court, but upon its practical operation and effect.

In **Crew Levick Co. v. Pennsylvania**, 245 U. S., 292, holding a statute of the State unconstitutional, this Court said, on page 294:

As in other cases of this character, we accept the decision of the State Court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the **actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the State courts.**

In **Mountain Timber Co. v. Washington**, 245 U. S., 219, after referring to certain constructions placed on a statute by the Court of last resort of the State, this Court said:

We are not concerned here with any mere question of construction, nor any distinction between the police and taxing powers. The question whether a State law deprives a party of rights secured by the Federal Constitution depends **not upon how it is characterized, but upon its practical operation and effect.**

In **Railroad v. Arkansas**, 235 U. S., 350, this Court said, on page 362:

Upon the mere question of construction we are, of course, concluded by the decision of the State Court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the

decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.

In **Ludwig v. Telegraph Co.**, 216 U. S., 146, on page 162, this Court said:

If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation, seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the State Legislature may not have intended to enact an invalid statute.

In **Reid v. Colorado**, 187 U. S., 137, beginning on page 150, this Court said:

Certain principles are well settled by the former decisions of this Court. One is that the purpose of a statute, in whatever language it may be cast, must be determined by its natural and reasonable effect. * * * Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it.

In **Stockard v. Morgan**, 185 U. S., 27, this Court, on page 36, said:

The fact that the State or Court may call the business of an individual, when employed by more than one person outside the State, to sell their merchandise upon commission, a "brokerage business," gives no authority to the State to tax such

a business as complainant's. **The name does not alter the character of the transaction**, nor prevent the tax thus laid from being upon interstate commerce.

In **Robbins v. Taxing District**, 120 U. S., 489, this Court significantly said:

The mere calling of the business a drummer a privilege cannot make it so. Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? It seems to be forgotten, in argument, that the people of this country are citizens of the United States, as well as of the individual States, and that they have some rights **under the constitution and laws of the former, independent of the latter, and free from any interference or restraint from them.**

In **Mugler v. Kansas City**, 125 U. S., 625, this Court said:

The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty,—indeed, are under solemn duty—to look at the substance of things, whenever they enter upon an inquiry whether the legislature has transcended the limits of authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

In **Henderson v. Wickham**, 2 Otto 179, the Court said:

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the

object of statute, as adjudged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on the passengers as if collected from them, or a tax on the vessels or owners for the exercise of landing their passengers in that city.

We submit, therefore, that learned counsel can really find no comfort in these definitions and characterizations, but, as determined by the constitutional protection invoked and whether the rights of the taxpayer in the case at bar, secured by the Federal Constitution have been infringed, we must look solely to operation and effect of the statutes as applied. When this is done, it inevitably results in a tax pressing upon the powers and operations of Congress, and invading that sphere of action and taxation into which the Congress of the United States alone can enter.

III.

The Gross Production Tax Cases decided by this Court, and holding the **Gross Production Statutes of Oklahoma**, as applied to leases of the character involved herein, unconstitutional, and their companion case **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, holding any taxing statute of the State of Oklahoma, as applied to such leases, directly or indirectly, unconstitutional, apply to the **Income Tax Statutes of Oklahoma**, clearly making them likewise unconstitutional as so applied.

The Attorney General has tried very hard to escape from the doctrines and application of what are com-

monly known as the Gross Production Tax Cases, heretofore decided by this Court, and which have been named in both Briefs so far filed in the case at bar, but we confidently believe has failed to do so. Linked with these cases is that of **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, which this Court has heretofore indissolubly tied with the other cases.

They clearly apply, because all of them have applied the rule that the State is absolutely without any power to directly or indirectly tax a Federal agency or instrumentality, and that same rule applies to the attempted application of the Income Statutes of Oklahoma to income derived from the leases involved in the present case.

Both the Attorney General, however, and the Chief Justice delivering the opinion in this case, and in the other case, which he considered controlling in this, have tried to escape the force of these cases.

The learned Chief Justice has presumed these many cases, so emphatically decided by this Court, away, and has swept them as authorities from his Court by the simple jugglery of presumption. The learned Attorney General, however, with either a better memory, or having more carefully reviewed the records in the cases, apparently has refused to follow the Chief Justice in his far-reaching presumption, and frankly admits that this Court did have the Act of 1916 in view, when making its later rulings, and handing down a memorandum opinion in each case later following, but asks this Court now to overrule them.

In his opinion again sustaining the validity of the Gross Production Statutes of 1916, as applied to leases like those now involved, after having stated the contention that the State was foreclosed by the decisions of

this Court, and that his Court was bound by such decisions, and after having made a short quotation from the **Harrison Case**, and having named the cases, the Chief Justice said:

Neither of the other decisions even mentions the question, and none of them, not even **Choctaw Ry. Co. v. Harrison**, makes the slightest reference to the statutes under consideration here. In **Choctaw Ry. Co. v. Harrison**, a different statute (the statute of 1907-08) was under consideration, a statute which in its purpose and in its provisions was altogether different from the statute now involved. In neither of the other decisions does it appear what statute was involved, nor what question was decided. They merely follow **Choctaw Ry. Co. v. Harrison**, and **Ind. Ter. I. Oil Co. v. Oklahoma**, without disclosing what statute was involved or what question was decided. The reasonable presumption upon their face would be that the same statute and same questions were involved in each case that were decided in **Choctaw Ry. Co. v. Harrison** and **Ind. Ter. I. Oil Co. v. Oklahoma**.

The Chief Justice then proceeds to show that this Court merely handed down, in each case, a memorandum, deciding each case on the authority of the preceding cases, which had been decided up to that time.

The learned Attorney General, however, beginning on page 14 of his Brief, naming the cases (eliminating cross citations in the quotation), states his position as follows:

If, however, the court should determine that the rule announced in the Gross Production Tax Cases does apply to the Income Tax Act of Oklahoma, then defendant in error respectfully asks to be heard in an effort to show that the rule announced

in the decided cases going up from Oklahoma were not determined with reference to the **1916 Act of the Oklahoma Legislature**, and, as applied to said **Act of 1916**, the holding in the former cases, to-wit: the **Choctaw, O. & G. R. Co. v. Harrison**, 235 U. S. 292; **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522; * * * **would be incorrect**; and, further, that in determining the cases of **Howard v. Gypsy Oil Co.** and **Consolidate Cases**, 247 U. S. 502, and **Large Oil Co. v. Howard**, 248 U. S. 549, * * * **which did involve the 1916 Act of Oklahoma**, they were decided without reference to said Act and without a careful regard to its provisions, but upon the theory that the statute involved was the former one heretofore construed and those cases should, therefore, be overruled.

The Attorney General, therefore, knows that the Act of 1916 was involved in these later cases, and were then declared invalid by this Court, as applied to identically the same kind of leases involved in the case at bar.

We submit also that there was no substantial foundation for the presumption indulged in by the Chief Justice; for we cannot refrain from believing that he should have known exactly the facts, if he had reviewed the records, which he himself participated in making.

The present Chief Justice of Oklahoma was an Assistant Attorney General, and participated in the **Indian Territory Illuminating Case** before this Court, and was an Assistant Attorney General, and actively participated in the **Large Oil Company Case** in this Court, helped to make the record, filed an elaborate brief of 105 pages in this Court, and, although at the time a member of the Supreme Court of Oklahoma, argued that case before this Court.

In the Transcript of Records and File Copies of Briefs, 1918, Case No. 160, October Term, 1918, Bound Volume 39, will be found the entire records of the Case in this Court.

In the Brief, which the Chief Justice, as Assistant Attorney General, prepared, on page 1, the following language is used:

This cause comes to this Court for review, by writ of error to the Supreme Court of Oklahoma, and by motion and writ of certiorari. It was originally instituted in the District of Oklahoma County, Oklahoma, by plaintiff in error, to recover certain taxes alleged to have been paid to the State of Oklahoma, under duress and protest, and to enjoin the State Auditor from enforcing the Gross Production Tax Law of said State against the property of plaintiff in error, and **involves the validity of Chapter 39, Session Laws of Oklahoma, 1916** (pp. 102-110).

He further said in his Brief:

Under the provisions of Chapter 39, Session Laws of Oklahoma, the State of Oklahoma sought to tax plaintiff in error's share of said oil and gas, after said share had been segregated from the soil, separated from the royalties due the Indians, and reduced to the personal possession of the plaintiff.

A presumption, as we understand, is usually indulged in, where there is an absence of proof or knowledge, and we confess we are not able to fully grasp its soundness, although predicated apparently upon the fact that this Court handed down, in each instance, merely a memorandum opinion. Our own disposition would be, if meeting a like result, to infer or fear that the case

presented had seemed so unsubstantial to this Court that it had concluded it was unnecessary to write a formal opinion.

The learned Chief Justice, after having swept aside these cases as an authority, then proceeded to hold that the Statutes, heretofore held invalid by this Court, as applied to such leases, is in fact a property tax, based merely upon being in lieu of such property as might be taxed by the State of Oklahoma. This conclusion is reached, largely, by a provision in the statutes, which the Chief Justice quotes, with a liberal use of asterisks and omissions, making the applicable part of the Statute, as shown on page 35 of the Defendant in Error's Brief, as follows:

The payment of the taxes herein imposed shall be in full and lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities * * * upon the machinery, appliances and equipment used in and around any well * * * and also upon the oil, gas, asphalt or ores * * * during the tax year in which the same is produced.

Let us, however, place against this the statute as it fully reads, and it will appear how different the statute really is. A part of Section 1, Chapter 39 of Oklahoma Act of 1916, giving the preceding excerpt in full, followed by a significant clause not incorporated, reads as follows:

The payment of the taxes herein imposed shall be in full and lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities, **upon any property rights attached to or inherent in the right to said minerals, upon**

leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to the land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, **and upon any investment in any leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described.**

The statute, as fully quoted, needs but little comment. It is not aimed merely at ascertaining the fair cash value of the property of the party sought to be taxed "as a going concern," but it reaches out and seeks to grasp "any property rights attached to or inherent in the right to said minerals," and the leases for the mining "of petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid **belonging or appertaining to the land,**" and any investments in any **leases, right, privileges, minerals or property,** mentioned in the paragraph. It reads dangerously near, if not conclusively so, to finally resting the tax upon a lease or property, which this Court has declared time and again cannot be taxed; in fact, it does.

It may be that receipts from interstate commerce under property conditions, may sometimes be taken

to measure a tax, and be sustained, but, so far as we know, this Court has never yet allowed the State to come so near to one of its own instrumentalities as to permit the emoluments allowed for compensation to be used as a measure to impose a property tax. If the State be permitted to do that, then it has been allowed to touch something that so far this Court has stubbornly refused to countenance. The moment this can be done, it puts in the hands the power to influence and affect something not yet bestowed upon it.

We shall not now undertake to build cases under those now attacked to support them; for we cannot believe, unless better reasons are given and more convincing authorities cited, this Court will overrule any of these cases so far decided by it. It seems to us, if it were to undertake to overrule the **Harrison Case** or the **Indian Territory Case**, it would have to recede from all it has ever decided as to the underlying principles.

If authorities are needed, however, it is only necessary to turn to those, upon which they have been decided, and those upon which we are resting our contention in the instant case; for every one of them is surcharged with doctrines that will forever sustain them as made.

IV.

The opinion or decision of the Supreme Court of Oklahoma herein construes the income taxes involved, and attempts to sustain them, as a property tax, which is a tax on the leases themselves, and they cannot, therefore, be sustained.

It has been our contention from the very beginning of this case, that the income taxes sought to be imposed

upon the income derived from the leases involved, with the inherent restrictions they have through the Indians, is, in effect a tax upon the leases themselves. We need go no farther, however, than the opinion handed down by the Chief Justice of the Supreme Court of Oklahoma in order to establish this proposition.

That part of the opinion undertaking to dispose of the precise tax in question bottoms the decision on the case of **In Re Protest of Skelton Lead & Zinc Co.**, not yet officially reported, but heretofore referred to in this Brief and the other Briefs in the case.

The opinion proceeds upon the theory that there were two questions involved, first, as to whether or not the income tax laws of the State were at all constitutional, and second, as to whether or not to levy such a tax upon incomes derived from leases upon restricted lands.

Not until this opinion was handed down did we ever know the first question was involved. It was never presented to the Supreme Court of Oklahoma, and the taxpayer has never questioned the right of Oklahoma to tax incomes, where properly within the taxing powers of the State, and the record before this Court in this case shows that he has been paying such taxes to the State of Oklahoma. No contention has ever been made as to the right of the State to tax incomes generally, no such is now made, and will not be made. Our contention is that the State is without power to tax the income from these restricted Indian leases.

That part of the opinion sustaining the general validity of the statutes, seems to be based upon authorities following a characterization of an income tax similar to that made by Mr. Black in his Work

on Income Taxation, which may be very well, when considered aside from some constitutional limitation or prohibition. In his definition, he undertakes to take it out of all the other ordinary class of taxes, and explicitly excludes it from property taxes.

After, however, having decided this question that was never raised, the Chief Justice then proceeds to the precise tax involved, and construes it to be a property tax pure and simple.

On this question, he said:

As to the second proposition, the question of the validity of the precise tax here involved depends primarily upon the validity of the 'gross production tax' provided for in Chap. 39, Sess. L. 1916, as applied to the lessee's private share of the products from the Departmental leases upon restricted lands, and, the 'gross production tax,' **being a 'property tax,'** as was held by the Supreme Court of the United States in *Shaffer v. Carter*, supra, the validity of which, as **'a property tax'** upon the same class of property here involved, was sustained by this court at this term in *In Re Protest of Skelton Lead & Zinc Co.*, No. 11197, not yet reported, then upon the authority of said cases and the reasons therein given, the validity of the income tax involved herein is sustained.

So, under this decision, the Supreme Court of Oklahoma has construed its income tax laws as imposing a property tax, and it is now bound by this construction. It is true that the Chief Justice undertakes to limit the Gross Production Tax to what he calls the private share of the lessee, but that cannot be true in the case of incomes, for taxes thereon are not in lieu of ad valorem taxes, and are not professed to be. It will

necessarily stand in the same position as an income derived from any other class of property; for the unique method adopted by him to pounce upon the "private share," in the Gross Production case was the phrase in lieu of ad valorem taxes. As applied to income taxes, therefore, as a property tax it must have its usual meaning, and must be held to be imposed upon the property from which the income is derived, and that is necessarily the lease. There is no method provided in the income tax law so the rate can be varied according to the ad valorem tax, so much vaunted in his Gross Production decision, and, being a property tax, according to this decision, it necessarily embraces the entire property, and cannot kidnap the "private share of the products from departmental leases upon restricted lands," and steal away from the rest of the entity of the property, the lease, and frolic in tax-blessedness free of the constitutional prohibition so plainly circumvented. Thus admitting it is a property tax, that is a tax imposed upon the leases themselves, we need to refer this Court to but a few cases, already invoked. The following, among many others that might be mentioned, will settle the question and conclusively establish the invalidity of the tax:

Indian Territory Illuminating Co. v. Oklahoma, 240 U. S. 522;

Farmers Loan & Trust Co. v. Minnesota, 232 U. S. 516;

Pollock v. Loan & Trust Co., 157 U. S. 529.

V.

The income from the leases involved herein is not so remote from the source as to subject it to taxation by the State.

Counsel make much of what they are pleased to treat as the remoteness of the net income from its source to make a tax on it inhibit by the Constitution. They have cited some cases in support of this theory, where property has been subjected to taxation, and have cited the interstate cases, and the export case. They have not cited any case, however, where the income paid directly by the Federal Government, or provided by it to its agents or instrumentalities has been held too remote to be protected, and they cannot cite any such cases.

We have already unfolded the principles and established the rules by which the cases relied on by the State are shown to be distinguishable from the case at bar, beginning on page 178 of our Brief in Chief, and have noticed some of the cases cited, and shall not now notice them all in detail. We shall, however, briefly again notice this insistence of the State. All the cases relied on by the State are clearly distinguishable.

Both counsel and the Chief Justice make much of the case of **Thomas v. Gay**, 169 U. S. 264.

This case carries with it the distinction in the quotation used by the State. The following is quoted:

The taxes in question here were not imposed on the **business** of grazing, or on the **rents** received by the Indians, but on the cattle as the property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so it is

too remote and indirect to be regarded as an interference with the legislative power of Congress.

Referring to the **Pollock Case**, the Court also said:

The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied **on the rents** received by the Indians of their unoccupied lands for grazing purposes.

The rents paid the Indians were the only ones flowing from the lands, but the general principle recognized is that income derived from the lands would fall within the prohibition. In the case at bar, there is royalty going to the Indians and compensation running to the lessee, and the lessee is employed by the Government to discharge this duty and do this work for the Government, which it must either do itself or employ some one else to do it. If the Government were doing the work itself, and retaining what it allows the lessee to have for his services, would any one say the State could tax the income or reward? A similar situation should have existed to make that case applicable to this case.

As to the interstate cases, we have heretofore shown that the parties taxed are not employed by the Government to engage in interstate commerce, but are merely conducting a business guarded by constitutional provisions. In order to make those cases applicable, the Government should have the same duty to engage in interstate commerce that it does in exploiting the lands of these Indians. If so, then the cases might be invoked.

The income here is no more remote than was the in-

terest from the municipal bonds in the **Pollock Case**, and the lessee in the case at bar, and the leases under which he is operating, are as much instrumentalities of the Federal Government as were those municipal bonds instrumentalities of the State, and they fall clearly within the rule of that case. We are not now, and we never have relied merely on the fact that an income tax would make the proposed lessees pay less for the leases. That is merely an incident, which shows that, if the States could tax this income, and that the exercise of the power might, and probably would, have a sensible effect on this power of the Government and the contracts, which the Government might execute, or permit them to execute. We freely recognize the right and power of the States to tax, but we deny its right to tax at all these instrumentalities, and we are standing on the broad principles of the cases, which we have cited, and not merely these incidental factors that may intervene.

We have, however, in our first Brief, called to the attention of the Court, a case which recognizes there is a sharp distinction between the matter of interstate commerce, and an agency or instrumentality of the Federal Government.

The case referred to is that of **Williams v. Talladega**, 226 U. S. 404, beginning on page 60 of that Brief.

Refusing to hold the ordinance void as to interstate commerce, and holding it void as taxing messages sent and paid for by the Government, the Court said:

As to the Government message, it is a tax by the State on the means employed by the Government of the United States to execute its constitutional powers, and therefore, void, * * *

The ordinance sustained in *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, expressly excluded interstate and Government messages.

Were it otherwise, an agent of the Federal Government in the execution of its sovereign, would be at the mercy of the taxing power of the State.

VI.

If this Court adopt the definition, classification and nature of the tax claimed by the State, and supported by the opinion or decision of the Supreme Court of Oklahoma, and permit the operation and effect resulting, then the income from every Federal instrumentality or agency will be taxable by the State.

The claims made by the State as to the nature of the tax in question, and the practical effect of the decision of the Supreme Court of Oklahoma show why this Court has been compelled to so often reiterate the rule shown under Point II of this Brief.

We are met in this case with the claim in one breath that the tax is not a property tax, and in the other that it is. As we have shown, the learned Chief Justice predicates a part of his opinion in the case on the authorities that the income is a thing separate and apart from the source, and the part determining the final disposition of the precise tax on the ground that it is a property tax. The Attorney General seeks to sustain him on both theories.

If the definition given by Mr. Black be accepted, or the interpretation of the Constitution of Wisconsin by its Supreme Court in *State v. Frear* be adopted, then it sweeps away every barrier that has heretofore faced the States in attempting to tax the instrumentalities and agencies of the Federal Government, and in taxing its powers and operations.

Mr. Black separates it from every other form of taxation, and gives it a distinct, independent and different character and nature from any other tax that ever existed.

Let us read it and see. His statement is as follows:

An income tax is distinguished from **other forms of taxation**, in that it is **not levied upon property**, nor upon the **operation** of trade and business, **or the subjects employed therein**, nor upon the practice of a profession or the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources or **from all combined**, annually, or at stated intervals.

Applying this statement literally and broadly as stated, and as attempted to be done in the case at bar, no officer, high or low, would be protected from State taxation on his salary, although this Court has so emphatically held that such is exempt from State taxation. If the President of the United States should have retained an interest in his newspaper, the income of that would be combined with his salary as President, and there would be produced a thing called net income, from the combined sources, so distinct from the constituent elements of the entire income, that all trace of the original nature of any particular element or part of the income would be completely lost, and it would be swallowed up in the combined result, and become taxable. That is exactly the result now being claimed.

But certainly, if such magic touch of transmutation exists where there is a combined income, the same result would necessarily follow, even though there happened to be but one source of income, and that source

exempt from taxation by the State. But, as now claimed by the State, and as supported by the decision of the State of Oklahoma, the income becomes such that there can be no inquiry as to its source, but it is removed so far therefrom that it has lost all connection therewith. Under the theory now presented, it is not the practical operation and effect of the tax that determines whether or not it infringes the constitutional prohibition, but it is determined solely by some academic definition, like those now invoked.

This entirely ignores, what the **Pollock Case** has so pertinently put, when the Court said, "**if the source is not open to inquiry, the constitutional safeguards might be easily eluded.**"

This briefly shows what the practical operation and effect the application of such a principle would lead to. It would throw the door wide open for the States to tax the income of every instrumentality and agency of the United States, and, through income taxes, it could reach every kind and character of property, agents and instrumentalities used by the Federal Government. If it is to be applied to the present instrumentalities, it can equally be applied to others, and the interest on the bonds and obligations of the United States would be as much subject to the taxation as is the income now involved. This Court must once more apply the rule that it has uniformly enforced, and protect the rights existing under the Federal Constitution, where mere definitions, classifications and characterizations are sought to justify the application of a law, which, in its practical operation and effect, so plainly contravenes the constitution.

CONCLUSION.

Time forbids, and doubtless necessity does not demand, that all the cases cited by Defendant in Error and the learned Chief Justice should be specifically noticed and distinguished, and we shall not attempt to do so.

We have no quarrel with the cases decided by this Court, upon which the State relies, when applicable and controlling. The decisions of the State Courts, construing their local laws, necessarily have but little bearing upon this case, but we do not even quarrel with them, so far as applicable under the decisions of this Court. We maintain, however, that they are not applicable, and are always distinguishable, and that the cases upon which we rely are the ones fitting the case and controlling. We do not, and shall not, ask this Court to modify or overrule a single one of its decisions, but stand upon all the decisions of this Court that are in any way applicable and controlling.

After a review of the most able brief of the Attorney General, prepared so skillfully by his Assistant, and presenting the case from the viewpoint and hopes of the State as ably and fully as could be done, we reaffirm our belief that this Court is now presented with a case, where it is necessary to preserve the sovereignty of its Government, and in which it must exercise its authority to so preserve that sovereignty.

We again respectfully submit that the decision and judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted,

JAMES PATRICK GILMORE,
Attorney for Plaintiff in Error and Petitioner.

FILED

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WM. R. STANSBURY

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1921.

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No. 322.
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F. A. GILLESPIE,
Plaintiff in Error,
vs.
THE STATE OF OKLAHO
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—
F. A. GILLESPIE,
Petitioner,
vs.
THE STATE OF OKLAHOMA,
Respondent.

—
**SUPPLEMENTAL REPLY BRIEF FOR PLAIN-
TIF IN ERROR AND PETITIONER.**
—

JAMES PATRICK GILMORE,
Attorney for Plaintiff in Error and Petitioner.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1921.

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F. A. GILLESPIE,
Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA,
Defendant in Error.

F. A. GILLESPIE,
Petitioner,
vs.
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Respondent.

SUPPLEMENTAL REPLY BRIEF FOR PLAIN-
TIF IN ERROR AND PETITIONER.

STATEMENT.

Since filing our Reply Brief, which was hastily prepared, and filed under the supposition that the case might be reached on the 5th instant, as advanced and specially set, there has reached our attention a case, which is exactly in point, and decides the identical question involved in the case at bar, and we feel we ought to call the Court's attention to this case, and

desire its indulgence in doing so. While to us the case seems to be a simple one, and we believe it has been decided on principle time and again, yet the learned Attorney General and his able Assistant are so insistent on the proposition involved, and the learned Chief Justice of Oklahoma has finally changed the first opinion decided by his Court, and now so doggedly maintains that the income involved is taxable, we feel justified in adding this case directly in point to what we have already called to the attention of the Court, and, of course want to present it to the Court in the usual printed form, which can now evidently be done before the case is reached for argument.

I.

The case of Oahu Railway and Land Co. v. Pratt, 14 Hawaiian Reports, 126, is exactly in point, and states the underlying principles of law, which should be applied to the case at bar.

We have demonstrated by the many cases cited by us in our Principal Brief and Reply Brief, that, where the property whence the income is derived is exempt from taxation, necessarily the income so derived therefrom cannot be taxed. It seems to us that ought to be axiomatic, but Chief Justice Harrison has seemed to find a way around the constitutional prohibition that is satisfactory to him.

In the case of **Oahu Railway and Land Co. v. Pratt, 14 Hawaiian Reports 126**, there is found a case exactly in point, and clearly and decisively shows the only result that can be reached in the case at bar. As the case comes from a Report not often cited, for the convenience of the Court, we shall give the case quite fully in its pertinent parts.

The case was an original submission under the statutory provisions of the Territory of Hawaii, arising under the Income Tax Law of the Territory, which contained the usual provisions of such a law, very similar to those now involved. The question was squarely presented as to whether or not that Territory could tax the income of property, when the property from which the income was derived was itself exempt from taxation. The Court held such income could not be taxed.

The Court stated the questions propounded under the Income Tax Law of the Territory as follows:

- (1) "Is the plaintiff wholly exempt from taxation on its income?" (2) "Is the plaintiff exempt from taxation on so much of its income **as is derived from property fairly necessary to the reasonable construction, maintenance and operation of its road?**" (3) "Is the plaintiff exempt from taxation on so much of its income as is derived from wharfage, storage, scales or subsidy as set forth in paragraph four of this submission?"

The Court stated the material parts of the submission as follows:

3. "That of the sum of \$900,846.83, gross income of said plaintiff as shown by schedule "A" of said return, the sum of \$601,206.89 was income derived from property which the defendant admits **is fairly necessary for the reasonable construction, maintenance and operation of said railroad;** and that the sum of \$207,889.04 was income derived from property which plaintiff admits is not fairly necessary to the reasonable construction, maintenance or operation of said railroad."

4. "That the remainder of said income, to wit, the sum of \$82,750.90, the sum of \$31,386.34 was for wharfage collected from vessels not belonging to plaintiff, using the wharves of said plaintiff in Honolulu harbor while delivering freight to be

carried over plaintiff's railroad, and while loading freight from plaintiff's warehouse; the sum of \$5,196.37 was for storage collected where goods had been stored in the warehouse of plaintiff awaiting the arrival of vessels, but which had not been carried over the railroad of plaintiff; the sum of \$3,469.15 was received for the use of plaintiff's scales in freight shipped over the plaintiff's road; and the sum of \$42,700 was a subsidy received from the Government and paid to the plaintiff pursuant to the provisions of Chapter 31, of the Session Laws of 1890 (being Sections 581 to 584, 1897)."

5. "That the contract entered into by the Minister of the Interior with plaintiff's assignor, as hereinbefore set forth, contains the following provisions pertinent to the issues involved in the controversy: 'That the said party of the first part does by these presents covenant and agree with said party of the second part, his associates and successors, and their assigns, and to and with such corporation as shall be formed or authorized by him or them as aforesaid, **that no taxes shall be levied by the Hawaiian Government for a period of twenty years from the date hereof, upon the property of the party of the second part, his associates and successors, or such company, which shall be fairly necessary to the reasonable construction, maintenance and operation of said steam railroad or railroads.**' Which exemption was authorized by said Chapter 62 of the Session Laws of 1888."

The Court, among other things, held as follows:

A tax on income is in substance and effect a tax on the property producing the income.

Income derived from property exempt from taxation by contract, authorized by statute, is also exempt.

The Court, after having stated that the plaintiff made no contention as to the first question submitted, and conceded that the exemption of income from taxation could not extend further than such income is derived from property itself exempt from taxation, emphatically held that the income from property exempt from taxation itself could not be taxed, saying:

It is contended on behalf of the defendant that income is **a separate and distinct thing** from the property from which it is derived, and that, although the exemption includes all property **"fairly necessary to the reasonable construction, maintenance and operation"** of the road, it does not follow that **the income from such property is exempt and cannot be taxed**. This contention may be ingenious but it can scarcely be considered sound. It is not material to the determination of the question presented whether or not the income and the property producing the income are one and the same thing. **The real question is whether or not a tax on the income is a tax on the property from which the income is derived**. If this last question is answered **in the affirmative**, the income produced from **exempt property is clearly within the exemption**. This ought not at this time to be regarded as an **open question**. The Supreme Court of the United States in **Pollock v. Farmer's Loan & Trust Co.**, 157 U. S. 429, said: "The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxation, **and the rent or income, which is the incident of its ownership, belongs to the other?** We are unable to perceive any ground for the alleged distinction. **An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.**" At p. 581.

Again, on the rehearing of said cause, Chief Justice Fuller speaking for the Court, said that a tax on income from real estate "**fell within the same class as the source from whence the income was derived**, that is, that a tax upon the realty and a tax on the receipts were alike direct." 158 U. S. 618.

In the light of these decisions, it is clear that **a tax on the income derived from exempt property would be in "substance and effect" a tax on the property producing the income**, and a violation of the terms of the contract, existing between plaintiff and the Government of Hawaii, **exempting such property for a period of twenty years**. It follows that an affirmative answer must be returned to question Number 2.

What other result could be reached so long as the cases of **Pollock v. Loan and Trust Co.**, 157 U. S. 429 and 158 U. S. 601, and **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, stand as the law of the land? The **Pollock Case**, which has never since been shaken, as we have shown in our other Briefs, establishes the general principle that, **where the source cannot be taxed, the income derived therefrom is equally as absolutely exempt from taxation**. Following that, the **Indian Territory Illuminating Oil Company Case** clearly establishes that the leases involved are instrumentalities of the Government of the United States, as much as are its bonds, or the bonds of its municipal corporations, as in the case of **Farmers & Merchants Savings Bank v. Minnesota**, 232 U. S. 516, and that the taxpayer is an agent and means of that Government created and employed by Congress to carry into execution powers conferred upon that body by the people of the United States by and through the National Constitution, as much as was the Bank in the

case of **McCulloch v. Maryland**, 4 Wheat. 316. It must also never be forgotten that, in the **Pollock Case**, on the proposition of denying the right and power to Congress to tax the bonds of municipal corporations, as the agents or instrumentalities of the States, this Court was unanimous in its opinion, and the converse is true as to the right and power of a State to tax an agent or instrumentality of the Federal Government. These four cases, therefore, in each of which there was a unanimous decision and opinion by this Court upon the principle involved and decided, which is decisive of the case at bar, forever foreclose the question as to the right and power of the State of Oklahoma to tax the income derived from the leases under consideration, and place athwart the persistent attempt to reach such leases by taxation a bar too strong and impregnable to ever be broken through, and too high to ever be scaled by, the ingenuity of the Legislature, and the astuteness of the Supreme Court, of that State.

We do not need, therefore, to rely on the **Gross Production Tax Cases** to establish the invalidity of the taxes sought to be sustained in the case at bar. The **Indian Territory Illuminating Oil Company Case**, involving leases of identically the same kind as those now under consideration, determines the fate of the taxes now sought to be imposed and sustained, aside from the many **Gross Production Tax Cases**, which this Court has heretofore specifically decided.

However, this Court has grouped and linked the **Indian Territory Illuminating Oil Company Case** and the **Gross Production Tax Cases** indissolubly together, and has so far considered them the same in principle, and has treated them as being indistinguishable, and they are so in fact.

The case of **Railroad Co. v. Harrison**, 235 U. S. 292, was the first case decided by this Court in this series, and was argued November 3 and 4, 1914, and unanimously decided by the Court on November 30, 1914, in an opinion by Mr. Justice McReynolds. The second case, that of **Indian Territory Illuminating Oil Co. v. Oklahoma**, 240 U. S. 522, was argued before this Court on March 14, 1916, and unanimously decided on April 3, 1916, in an opinion by Mr. Justice McKenna. As we have heretofore shown, Chief Justice Harrison was an Assistant Attorney General under the present Attorney General, at that time, and both briefed and argued the last named case in this Court.

The Statutes of Oklahoma imposing the Gross Production Tax, which were involved and declared invalid in the **Harrison Case**, provided, that the tax to be paid "shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon such mining, oil or gas property and the appurtenances thereunto belonging." Evidently seizing upon a remark by this Court that "it is insisted that the statute, rightly understood, prescribes only an *ad valorem* imposition on the personal property owned by the appellant—the coal at the pit's mouth—which is permissible according to my opinions," the Legislature of Oklahoma got into quick action, and began to legislate, resulting in the Act of 1916, which was involved in the five subsequent cases, all unanimously decided by this Court, **Per Curiam** in memorandum opinions, merely citing the preceding opinions rendered by the Court, and linking with them the **Indian Territory Illuminating Oil Company Case**. The Act of 1916 undertook to provide, as shown on page 34 of our Reply Brief, that the taxes imposed, "shall be in full and lieu of all taxes" by the State and

its municipal subdivisions and municipal corporations, but broadly covered, as an examination of the statute will show, the entire property of the taxpayer, in effect covering the very leases themselves.

With this slight change in the statutes, the case of **Howard v. Gypsy Oil Company**, 247 U. S. 503, with which were consolidated and heard and determined three other cases, in one of which the **Indian Territory Illuminating Oil Company** was a defendant in error, soon reached this Court, and these cases were argued on March 26, 1918, and decided unanimously by the Court, May 6, 1918, in which this Court handed down merely a memorandum opinion, **Per Curiam**, on the authority of the **Harrison and Indian Territory Illuminating Oil Company Cases**.

Quickly following came the case of **Large Oil Co. v. Howard**, 248 U. S. 549, in which the learned Chief Justice of Oklahoma, rendering the opinion in the case at bar, had fully briefed the case as an Assistant Attorney General, and although then a member of the Supreme Court of Oklahoma, argued the case before this Court. The case was argued January 20 and 21, 1919, and unanimously decided by this Court, **Per Curiam**, on January 27, 1919, on the authority of the cases decided by it prior to that time, always linking with them the **Indian Territory Illuminating Oil Company Case**.

The case last mentioned was decided upon the authority of the **Harrison Case**, which is the only case cited, and doubtless considered necessary to be cited, in the determination of the case. While not a **Gross Production Tax Case**, involving the general taxing statutes of Oklahoma, this Court evidently considered it so near in principle as to be identically the same, the one controlling the other.

Briefly reverting to the **Indian Territory Illuminating Case**, our contention will stand demonstrated. Referring to the attempt to include the leases in determining the taxable value of the stock of the corporation, and laying the foundation for the use of the **Harrison Case** as a controlling authority, determinative of the case then being decided, this Court said:

Whether the Constitution of the State permits this accommodation, we are not called upon to say. We are clear it cannot be permitted to **relieve from the restraints upon the power of the State to tax property under the protection of the Federal Government.** That the leases have the immunity of such protection we have decided.

In **Choctaw, O. & G. R. Co. v. Harrison**, 235 U. S. 292, the railroad company was the lessee of certain coal mines, obligating itself to take out annually specified amounts of coal and to pay a stipulated royalty. It proceeded actively to develop the mines, either directly or through its agents, and took therefrom large quantities of coal and **fully complied with the obligations assumed.** The State of Oklahoma **attempted to tax the company** under a law of the State requiring every person engaged in the mining or production of coal to make a report of the kind and amount produced and the actual cash value thereof, and at the time to pay to the State Treasurer **a gross revenue tax** in addition to the taxes to be levied upon such mining property, equal to 2 per cent of the gross receipts from the total production. **The law was held to be invalid as attempting to tax an instrumentality through which the United States was performing its duties to the Indians.**

Applying the case as controlling, and linking it indissolubly with the case decided, and stating in another form the doctrine of the **Pollock Case**, this Court said:

The application of the case to that at bar needs no assisting comment. **A tax upon the lease is a tax upon the power to make them, and could be used to destroy the power to make them.** If they cannot be taxed as entities, they cannot be taxed vicariously by taxing the stock as evidence rather than by directly estimating them as the Board of Equalization and referee did. * * * It is manifest, therefore, when the Court took the stock as evidence of the value of the property of the company **the Court took it as evidence of the value of the leases, and thereby justified their assessment and taxation.** This, for the reasons we have stated, was error.

It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid.

These cases, therefore, all stand together, and support fully the decision and opinion by the Court in the case first cited, directly in point. We cannot see how the result could be otherwise, unless all these cases, which this Court has so emphatically and unanimously decided shall be overruled or absolutely ignored.

II.

Since the Income Taxes, under the Statutes of Oklahoma, are not imposed in lieu of taxes ad valorem, or otherwise, but, in effect, are in addition to all other taxes, including ad valorem taxes, and no procedure is provided to vary the rate of taxation to correspond to the ad valorem rate on the property of the lessees, even if the Gross Production Tax should be sustained, as to these restricted leases, such a case would be no authority for the imposition of the income taxes upon the income involved herein.

As we have heretofore shown in our other Briefs, the learned Chief Justice of the Supreme Court of Oklahoma undertakes to sustain the precise taxes, under consideration, by making an income tax, under the Statutes of Oklahoma, a property tax. He bases this holding, and reaches this result, on the authority of his opinion in the Gross Production Tax Case, decided by him at the time this case was determined, in which he overrules a prior Oklahoma decision involving the Act of 1916, and overrules and sweeps away the decisions of this Court by a presumption, and then holds the Gross Production Tax a property tax, and, on that authority likewise holds the taxes involved herein a property tax.

The learned Chief Justice seems to have proceeded on the theory that but one and the same tax, under one and the same statute, was involved in the two cases, and has failed to consider the vast difference between the two statutes, when we take his interpretation of the Gross Production Statute and place it aside the Income Acts involved.

The learned Chief Justice construes the Gross Production Act as imposing a tax in lieu of **ad valorem taxes**, and argues that it is, therefore, a tax, in which the property of the taxpayer is thus measured to secure really an **ad valorem** tax on the property of the lessee. In order to make his opinion an authority in this case, it would at least be necessary that the Income Tax Acts should make the tax in lieu of the property of the lessee taxable **ad valorem**, and that there should be provided a method by which the taxpayer could have the rate varied, from time to time, so that no greater rate of taxation would be imposed on his income than his taxable property would sustain by an **ad valorem** tax. The Income Acts, however, contain no such pro-

visions, and any income that is taxable is assessed fixed graduated rates, which cannot be varied, however, much higher they may be than the prevailing rates on the property taxable **ad valorem**.

If the Court will examine the Income Acts, set forth in the Appendix, it will find no such similar provisions, so relied on by the Chief Justice, in sustaining his Gross Production Tax. Section 7, of the Act of 1915, on different frames, provides graduated rates running from ten mills on the dollar to fifty mills on the dollar, while the Section, as amended by the Act of 1917, provides graduated rates of from seven and one-half mills to twenty mills on the dollar. These rates are fixed, and the crafty theory evolved by the Chief Justice crumbles, when applied to the Income Tax Statutes, must crumble.

The reasoning of the Chief Justice and the principles sought to be applied, lead to another result, which ought to make both taxes unconstitutional, and which would, at least, strike down the Income Tax, and, that is, the learned Chief Justice has imposed two property taxes on the same property, at two rates, each of which is presumed to be all the taxes that the property would bear **ad valorem**, creating double taxation in its most vicious form, the tax being double not only in the sense of being two taxes, but literally double in amount to what the property of other taxpayers are required to pay on an **ad valorem** basis. Thus, the learned Chief Justice, in his desperate effort to escape one constitutional prohibition, has enmeshed his Court in another no less, denying the result sought to be reached.

Unquestionably, the Income Tax is imposed in addition to all other taxes, and the Statutes, therefore, under the interpretation given by the Chief Justice, fall directly under the doctrine of both the **Indian Ter-**

ritory Illuminating Company Case, as well as the **Harrison Case**, and they must necessarily control in this case, whatever might be decided with reference to the Gross Production Act of 1916. The case of **Shaffer v. Carter**, 252 U. S. 57, so strongly relied on, becomes an authority against the State, notwithstanding the Court did remark that, "The Oklahoma gross production tax * * * was intended as a substitute for the **ad valorem** property tax." The Court in that case, however, meant merely that it could be used as a substitute for an **ad valorem** property tax, which was taxable, and not that it could be used as a substitute for such a tax, on property which was **exempt from taxation**.

The cases, therefore, which the State has cited, to the effect that a proper percentage of receipts may be taken as a basis of taxation by a State in determining the value of property taxable in the State, even where interstate commerce receipts are a part of the total receipts considered, or that net income from interstate commerce may be taken as a part of the whole income of the taxpayer, are clearly distinguishable. In those cases, the income is produced by property, or the use of property, which itself taxable, and the mere fact that a part of the income of the taxpayer is produced by the use and operation in this interstate commerce does not necessarily exempt it. In these cases, the Government does not participate in the interstate commerce, and does not employ the taxpayer as its agent therein, but the taxpayer, not as an agent of the Government, nor using the instrumentalities furnished him by the Government, and using taxable property to produce the receipts, engages in the interstate commerce simply under the constitutional protection, and not as an agent, instrumentality or means employed

by Congress to carry into execution the powers of Government conferred upon it by the Constitution. The income now involved, however, is produced by the very thing, the very instrumentality, agency and means created by Congress, and operated by a Federal agent, doing for Congress what is its duty and obligation to do, or employ some one else to do it. This Court has never held, that the receipts, either gross or net, derived directly from the Federal instrumentality or means, could either be directly taxed, or used as a measure of taxation to be imposed upon the value of property, which is itself exempt from taxation. The final analysis, therefore, of the construction of the statutes involved, by the Supreme Court of Oklahoma, necessarily makes it a property tax upon the lease, which cannot be sustained.

As we have shown, the very heart and life of this lease, the only thing that gives it value, is the income derived therefrom. This cannot be reached directly nor indirectly, yet, if the remarkable decision rendered by the Supreme Court of Oklahoma is to stand, it means no more than to say: You cannot stab the heart of this instrumentality through the breast, but you may slip up behind and pierce it through the back.

In conclusion, it must be remembered that the **Indian Territory Illuminating Oil Company Case**, involved the General Taxation Statutes of the State of Oklahoma, as attempting to indirectly involve practically identical leases in determining the assessable value of the stock of a corporation, and this Court held that, as the leases could not be taxed as entities, they could not be vicariously or indirectly taxed by any involvement, however, direct or indirect, close or remote. Here, however, there is a direct attempt to tax the very leases themselves; "for an annual tax upon the annual

value or annual user" of the leases is "the same in substance as an annual tax on" the leases, which would be paid out of the income.

The **Indian Territory Illuminating Company Case**, therefore, is controlling in the case at bar, and, if no other case had ever been decided, it alone is all the authority required to sustain our contention, and, since its decision, every Gross Production Tax Case, growing out of the Statutes of Oklahoma, could have well been decided on it alone, and on the ground that, since the source could not be taxed, the State could not thus tax the income derived therefrom. And that, we take, is what this Court did, when it began to decide the later cases upon its authority, as well as that of the **Harrison Case**, and it then put its decisions on the broader grounds than that of the effect of the tax was an occupation tax, but also it could not be sustained on the broader principles announced in the former case.

This is not, therefore, merely a question of depriving the State of Oklahoma of the right to collect some taxes, nor of relieving a taxpayer of paying some taxes to that State, whose Treasury has become so plethoric with taxes collected, that its Governor and State Auditor recently engaged in a spirited contest as to whether the State should make any levy, except that constitutionally required, for itself, but becomes a question of the necessity of this Court upholding the National Sovereignty, and preserving a great constitutional right. From every angle we approach the case, there appears insuperable barriers to the State of Oklahoma imposing the taxes involved.

Respectfully submitted,

JAMES PATRICK GILMORY,
Attorney for Plaintiff in Error and Petitioner.

FILED
OCT 4 1921
WM. H. STANSBURY
CLERK

NO. 322

In The Supreme Court Of The
United States

OCTOBER TERM, 1921

F. A. GILLESPIE, *Plaintiff in Error*,
VS.
THE STATE OF OKLAHOMA, *Defendant in Error*.

F. A. GILLESPIE, *Petitioner*,
THE STATE OF OKLAHOMA, *Respondent*.

MOTION TO ADVANCE CAUSE

Harlow Publishing Company, Oklahoma City, Okla.



In The Supreme Court Of The
United States

OCTOBER TERM, 1921

No. 322.

F. A. GILLESPIE, *Plaintiff in Error*,

vs.

THE STATE OF OKLAHOMA, *Defendant in Error*.

F. A. GILLESPIE, *Petitioner*,

vs.

THE STATE OF OKLAHOMA, *Respondent*.

MOTION TO ADVANCE CAUSE

Comes now the State of Oklahoma, the defendant in error, and respondent in the above entitled cause, pending on writ of error and petition for writ

of certiorari, respectively, and shows to the court that this cause is one of great and prime importance to the State of Oklahoma and to the United States of America, and that there are special and peculiar circumstances rendering it important that the cause be advanced, and therefore moves the court to make and enter its order advancing the hearing of said cause on its docket for the October Term, 1921, and to take same out of its regular order on said docket, and set the same down for a particular and certain date for hearing, and as early as same may be conveniently and consistently set for oral argument and hearing, upon the following grounds and for the following reasons, to-wit:

First. Because said case involves the right of the State of Oklahoma, and incidentally the right of the United States to tax the net income of lessees derived from leases by restricted Indians for oil and gas on the land of such Indians who are wards of the Government of the United States, and is of great and prime importance to the State of Oklahoma, as well as the United States, as determining the right to so tax such net income, and affects, and will affect and control a large volume of such net income and taxes to which the State of Oklahoma would be entitled as well as the United States, if this court should hold that such income is taxable, and there are a great many instances and cases depending upon and awaiting the decision of this court for final action by the tax collecting authorities of the State

of Oklahoma. The case involves all leases for oil and gas and other mining purposes on the lands of the full blood and other restricted Indians and citizens members of the Five Civilized Tribes or Nations of Indians, to-wit: the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indians, the lands of which cover a large part of the territory of the State of Oklahoma, and also the tribe or nation of Osage Indians, whose territory likewise covers a very large part of the State of Oklahoma, and also several other minor tribes, among others, the Shawnee, Pottawatomie, Cheyenne, Arapahoe, Iowa, Kansas or Kaw, Kiowa, Comanche, Apache, Kickapoo, Quapaw, Sac, Fox, Tonkawa and Wichita Indians, the income from all leases on the lands of which are directly or indirectly involved; that the territory of the Osages alone, leases on which are largely involved in this cause, measures approximately 1,500,000 acres, a large part of which is under lease, and the remainder thereof being rapidly leased, and which has proved very productive in oil and gas, and the income of all such leases now made and hereafter to be made is involved in and affected by this cause and the final ruling and decision which this court shall render and make herein.

Second. This is the first case of its kind brought before this court, and both to the taxpayers of the State and the United States holding similar properties, and the tax collecting officers of the State of

Oklahoma and of the United States administering the income tax acts, it is of supreme importance, and its speedy determination by this court is essential to the carrying on of the functions of government in the State of Oklahoma.

S. P. FREELING,
Attorney General of the State
of Oklahoma.

C. W. KING,
Assistant Attorney General
of the State of Oklahoma.
*Attorneys for the Defendant in Error
and Respondent.*

ACCEPTANCE OF SERVICE.

F. A. Gillespie, plaintiff in error and petitioner for writ of certiorari respectively, acknowledges service of this motion to advance, and joins therein.

Plaintiff in Error and Petitioner.

By -----
His Attorney.